Nos. 87-1614, 87-1639, 87-1668

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

JOHN W. MARTIN, *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

RICHARD ARRINGTON, JR., *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

THE PERSONNEL BOARD OF JEFFERSON COUNTY, *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX
Volume II

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August 18, 1988

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PETITIONS FOR *CERTIORARI* FILED MARCH 30, MARCH 31 AND APRIL 1, 1988
CERTIORARI GRANTED JUNE 20, 1988

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* These items are not formally in the record, and are included over the objection of Respondents' Wilks, *et al.* They are included by Petitioners on the basis that the district court on at least three occasions took judicial notice of the record in *United States v. Jefferson County*, the litigation that resulted in the consent decrees. *See* J.A. 54, 111, 186.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

OPINION

The defendants in these "reverse discrimination" cases have moved for partial summary judgment, seeking to dismiss portions of the plaintiffs' claims predicated upon the plaintiffs' higher rankings and test scores on selection procedures of the Personnel Board. The court concludes that, although the motions in their present form should be denied, an order should be entered which will likely have the same practical effect on further proceedings.

I. Background.

The present litigation stems from three cases instituted in 1974 and 1975 against the Jefferson County Personnel Board and various governmental agencies served by the Board, including the City of Birmingham. Two of these earlier suits were brought as class actions, charging racial discrimination against blacks in hiring and promotions; the third was brought by the United States, charging a pattern and practice of discrimination against both blacks and women. Among other allegations, the plaintiffs contended that the registers used to determine persons eligible for hiring or promotion were the product of discriminatory tests administered by the Board to screen and rank applicants and that the employing agencies engaged in still further discrimination when selecting individuals from these already tainted lists.

The cases were consolidated for trial in 1976 on the initial issue of the validity of tests used to screen and rank police and firefighter applicants. The court found that the tests had a severe adverse impact on blacks and were not sufficiently job

related to be valid under 42 U.S.C. § 2000e-2(h). The Board was directed to include in its future certifications to the employers a sufficient number of black applicants to avoid any adverse impact caused by these tests. This decision was affirmed in all major aspects. *Ensley Branch of NAACP v. Seibels*, 616 F.2d 812 (5th Cir.), *cert. denied sub nom. Personnel Board v. United States*, 449 U.S. 1061 (1980).

A second consolidated trial was held in 1979 regarding many other examinations and screening devices of the Board that likewise appeared to have an adverse impact on blacks or women. Experts for both sides presented extensive evidence regarding the effect and validity of these tests and procedures. While awaiting the court's decision, the parties engaged in extensive settlement negotiations that ultimately culminated in proposed consent decrees to resolve the litigation.[1] The settlements with the Board and with the City of Birmingham included both provisions benefiting specific plaintiffs or class members—such as back pay and preferential hiring or promotion—and provisions benefiting the entire class—such as goals for certification and selection of minority candidates in future hiring and promotional decisions.

On August 18, 1981, after a fairness hearing to consider the objections of all interested parties, the court approved the consent decrees with the Personnel Board and the City of Birmingham. The following day, the Birmingham Firefighters Association #117 and two of its members moved to intervene, contending that the decrees would adversely affect their rights. The court denied their request as untimely. This ruling was later upheld by the Court of Appeals. *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1984).

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1. The parties recognized that, regardless of the decision on the second trial, a protracted third trial would be needed regarding the particular practices of the various governmental employers. Although some evidence concerning these practices had already been obtained and indeed introduced in evidence, extensive additional discovery was likely. The settlement discussions were pursued with the objective of avoiding the time and expense of further discovery and trial and in recognition of the inherent risks of litigation regarding both the issues under submission and those remaining to be tried.

Several white male firefighters then filed an independent action against the Board and the City of Birmingham, attacking the consent decree as discriminatory. Although denying their application for a preliminary injunction against enforcement of the decrees[2], the court recognized that the consent decrees might not bar all claims of "reverse discrimination" since they had not been parties to the prior suits. Several other suits were subsequently filed as individual or class actions by white males, contending that promotions made by Birmingham purportedly to comply with the consent decree discriminated against them because of their race or sex. These cases have been consolidated for pretrial purposes under the master caption of the "Birmingham Reverse Discrimination Employment Litigation."

II. Scope Of Pending Motions.

The City and the intervening defendants[3] have moved for partial summary judgment as to those portions of the plaintiffs' claims that are premised on the plaintiffs' higher test scores or ranking on the Board's eligibility register. Many, although not all, of the facts that may have some bearing on this motion are not genuinely in dispute.

Paragraph 5 of the Consent Decree with Birmingham provides as follows:

> "In order to correct the effects of any underrepresentation of blacks and women in the City's workforce caused by any alleged prior discriminatory employment practices, the City agrees to adopt as a long term goal, subject to the availability of qualified applicants, the employment of

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2. This ruling was upheld by the Court of Appeals in *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1984) [sic].

3. The persons who represented the class of blacks in one of the earlier actions and were parties to the consent decrees were allowed, on timely motion, to intervene as additional defendants in these "reverse discrimination" cases. Similarly, the United States, as a party to the earlier consent decrees, was allowed to intervene; in January 1985 it requested permission to realign itself with the plaintiffs, with whose interests its own position regarding "reverse discimination" was more compatible.

> blacks and women in each job classification . . . in percentages which approximate their respective percentages[4] in the civilian labor force of Jefferson County . . . ."

In paragraphs 6-8 of the decree the City agreed that in order to achieve these long term employment goals it would attempt, "subject to the availability of qualified [minority] applicants," to fill a specified percentage of vacancies on an annual basis with such applicants, this percentage ranging from 15% to 50% depending on the particular job or department. In short, qualified minority applicants were to be given a preference for a portion of the subsequent job vacancies until the long range employment goals were reached or the decrees expired.[5]

The plaintiffs in these cases contend that they would have been selected for post-decree promotions but for their race or sex. They assert that Birmingham's obligations under the consent decree cannot be relied upon by it in defense and that, indeed, employment decisions made in order to comply with the requirements of paragraphs 5-8 would necessarily constitute impermissible discrimination. As has been discussed with counsel earlier in these proceedings, the court is persuaded that the defendants can, however, defend these reverse discrimination claims if they establish that the challenged promotions were made because of the requirements of the consent decree.[6] See

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4. For blacks the appropriate percentage is approximately 28%; for women, approximately 39%. The consent decree provides a mechanism for adjusting these goals with court approval for jobs requiring professional degrees, licenses, or certificates.

5. Under paragraph 55 of the city's decree, the court is authorized to dissolve the decree after six years from its entry—approximately 2-1/2 years from now. Any of the parties, including the United States (which now appears to oppose at least some aspects of the decree), may make such a motion, and the court is to consider whether the purposes of the decree "have substantially been achieved."

6. The Court of Appeals had pretermitted ruling on this issue in the intervention proceedings. See *United States v. Jefferson County*, 720 F.2d 1511, 1518 (11th Cir. 1983): "The consent decree would only become an issue [in an independent action asserting specific violation of their rights] if the defendant attempted to justify its conduct by saying that it was mandated by the consent decree. If this were the defense, the trial judge would have to determine whether the defendant's action was mandated by the decree and,

Palmer v. District Board of Trustees, 748 F.2d 595 (11th Cir. 1984).[7]

As a secondary contention, the plaintiffs argue that the decree cannot be used to justify a race-conscious or gender-conscious promotion if that action is not required by the decree.[8] They then note the provisions of paragraph 2 of Birmingham's consent decree:

> "Nothing herein shall be interpreted as requiring the City to hire unnecessary personnel, or to hire, transfer, or promote a person who is not qualified, or to hire, transfer or promote a less qualified person in preference to a person who is demonstrably better qualified based on the results of a job related selection procedure."

Plaintiffs contend that by virtue of this provision the decree does not require, and hence provides no protection against a claim of reverse discrimination based on, the selection of a less qualified black or woman. Plaintiffs propose to establish that they were demonstrably better qualified than the successful minority applicants and for this purpose will cite the higher

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if so, whether that fact alone would relieve the defendant of liability that would otherwise attach. This is, indeed, a difficult question. . . . We should not, however, preclude potentially wronged parties from raising such a question merely because it is perplexing. Since we assume that the forum hearing any future suit by the would-be intervenors alleging discrimination would consider their claims carefully, we hold that the district court was justified . . . in denying intervention."

7. The affirmative action aspects of the decrees regarding employment and promotion of blacks in the police and fire departments can be justified on the basis of the judicial findings—affirmed on appeal—that such persons had been unlawfully discriminated against in testing for entry level positions in those departments. The other affirmative action aspects of the decrees, although not based on judicial findings of discrimination, pass muster under the standards set in *Valentine v. Smith*, 654 F.2d 503, 510 (8th Cir.), *cert. denied*, 454 U.S. 1124 (1981), cited with approval in the *Palmer* case, 748 F.2d at 600.

8. This position stems from language in *United States v. Jefferson County*, 720 F.2d 1511, 1518 (11th Cir. 1983), in which the appellate court noted that an element in a defense based upon the consent decree would be

scores they received on the Board's promotional tests, which they assert are job related selection procedures.

The City and the intervening defendants assert that promotions of qualified minority candidates to meet the remedial goals established in the consent decree would not constitute unlawful discrimination, whether such promotions be mandated by the decree or merely permitted by it. They further contend that, even if their defense based on the decree is limited to employment decisions mandated by it, scores by applicants on the Board's tests—and in turn the position of such persons on the Board's eligibility register—would be immaterial in ascertaining whether the decree did or did not require particular promotions of minority applicants.

The pending summary judgment motions are focused on this latter contention; namely, that scores on the Board's promotional tests should not be considered in deciding whether particular applicants were demonstrably better or less qualified for purposes of paragraph 2. The ruling on these motions[9] has potentially great significance not only on the ultimate merits of the controversy, but also on the scope and length of further discovery and trial. Indeed, if test scores will be relevant in deciding the applicability of paragraph 2, one may expect a substantial controversy between the parties regarding the

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"whether the defendant's action was *mandated* by the decree." (Emphasis added.) The later decision of that court (by a panel with two of the judges who were on the *Jefferson County* case) in *Palmer, supra*, suggests a test more favorable to the defendants. In the present litigation the court has deferred its ruling as to the proper standard until the factual basis of the claims and defenses have been more fully developed.

9. Despite plaintiffs' arguments to the contrary, a motion under Fed. R. Civ. P. 56 is not an inappropriate vehicle for presenting this issue to the court. A defendant "against whom a claim . . . is asserted" may move under Rule 56(b) for summary judgment in its favor "as to . . . any part thereof;" and under Rule 56(d) the court may determine what "material" facts are controverted. Moreover, the motion may, to the extent appropriate, be treated as one for a protective order under Rule 26(c) against discovery that would be an "undue expense or burden" or as one under Fed. R. Evid. 104 for a pretrial motion on the admissibility of evidence.

validity of each test as a "job related selection procedure" for purposes of that paragraph.[10]

III. Discussion.

The basic facts regarding the procedures by which applicants are certified by the Board to the employing agencies have been stated in earlier decisions and need not be repeated in detail. In order to fulfill its responsibilities under state law, the Board develops and periodically administers tests to persons interested in civil service positions who satisfy any prerequisites for appointment established by the Board. For very practical reasons, these tests only purport to measure a sample of the knowledge, skills, and abilities that may be needed for successful performance of a particular job.[11]

An applicant's raw test score—which for some jobs is a composite of weighted scores on different segments of the examination—is converted by the Board into a single numerical score. Applicants scoring below the minimum established by the Board are eliminated from further consideration. To the converted test score of any "passing" applicant, the Board adds (as required by state law) one point for each year of the applicant's classified service, up to a maximum of 20 points. These individuals are placed on the Board's "Eligible Register" in the order of their combined total of test points and seniority points. The Board does not disclose this Register to the employing agencies or to the applicants. It does, however, provide to each applicant information about his or her own score and position number on the Register; to the extent they share this information, applicants are able to construct the equivalent of the Register.

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10. In such a controversy the position of two of the major parties might be the reverse of that in the earlier litigation. The United States, which previously had attacked the various tests as not sufficiently job related, may attempt to support their validity; on the other hand, the City may seek to challenge the validity of the tests.

11. For example, although the position of police sergeant may require both the ability to accurately shoot a firearm and knowledge of constitutional law, the Board does not attempt to measure applicants' abilities with firearms and attempts to measure their knowledge of constitutional law by asking some representative questions.

When advised that a governmental employer wishes to make a promotion, the Board submits to the employer a "Certification of Eligibles," which contains the top three names then remaining on the Register.[12] Under the consent decrees the Board may certify the names of additional qualified minority applicants from further down on the Register "whenever such action is necessary to provide the City with a certification list that contains sufficient numbers of blacks and females to meet the goals" of the decrees.

The certification sent by the Board does not reflect the test scores or Register ranking of the persons so certified. Birmingham acknowledges however that those making employment decisions "assume" that the order of names on the certification indicates their relative standing on the register—that is, that the second name on the certification is lower on the Register than the first name and higher on the Register than the third name.[13] Plaintiffs do not contend that the relative placement on the Register of the applicants establishes in and of itself that the higher ranked applicants are demonstrably better qualified for promotion.[14] Rather, they argue that the tests are job related selection procedures and accordingly that under paragraph 2 of its decree the city would not be required to promote applicants with lower test scores. They assert that city officials either know these scores or by inference from the certification can determine the relative scores of the various candidates. Alternatively they argue that, regardless of the knowledge the city

12. If multiple appointments to the same job are contemplated, the Board certifies an additional name from the top of the Register for each additional position.

13. The United States makes a curious attack upon the inclusion of such "assumptions" in the affidavits of the city's officials, asserting that such represents matters beyond their personal knowledge and hence impermissible under Fed. R. Civ. P. 56. These objections are without merit, for these "assumptions" are not being presented as evidence of what the Board actually does in making certifications, but only as evidence of the state of mind of the officials in using the certifications.

14. Although the validity of bona fide seniority systems is recognized under Title VII, it could hardly be contended that because of longer city service an individual would be demonstrably better qualified for promotion.

may have about test scores when deciding whom to promote, they—the plaintiffs—should be entitled in a subsequent claim of discrimination to demonstrate their superior qualifications by reference to the test scores and thereby show that the city could have promoted them without violating the consent decree. This latter contention should be addressed first because, if plaintiffs succeed on this point, there would be no need to determine what information city officials may have had about test scores when deciding on promotions.

Paragraph 2 provides in relevant part as follows: "Nothing herein shall be interpreted as requiring the City . . . to promote a person who is not qualified or . . . to promote a less qualified person in preference to a person who is demonstrably better qualified based upon the results of a job related selection procedure." The obvious purpose of the paragraph was to relieve the city from responsibility under the decree if, although otherwise mandated by the decree, it should reject a minority candidate because of the results of a job related selection procedure showing that person to be unqualified or demonstrably less qualified. In evaluating any failure by the city to meet its obligations under the decree, the court would focus its attention on the information the city had when it declined to appoint the minority candidates and not on subsequently obtained information that played no part in those appointments. Such a proceeding might well include further studies regarding the job-relatedness of the selection procedures upon which the city relied in making its employment decisions; however, there would be no need to determine whether promotional criteria not considered by the city might have been valid.

Although the context is different in this litigation involving claims of reverse discrimination, the answer is the same. In short, the effort by plaintiffs to show that promotions of minority candidates were not mandated by the decree because of paragraph 2 will depend upon their establishing, at a minimum, that when making those selections the city had information demonstrating that such candidates were less qualified. Consideration must therefore be given on these Rule 56 motions to the question of what information regarding test scores city officials may have had when deciding whom to promote from the Board's "Certification of Eligibles."

It cannot be genuinely disputed that the city officials have not been provided by the Board with test scores or ranking, seniority points, final scores or ranking, or position number on Register.[15] This is not to say, however, that city officials have absolutely no knowledge about such matters.

First, the appointing officials may be provided by or through the applicants themselves information about test scores or rankings. As earlier noted, applicants are provided information about their own scores and Register position and by sharing this information they can develop an approximation of the Register.[16] According to depositions and affidavits submitted by plaintiffs, these unofficial listings are sometimes posted at fire stations or other locations where they are viewed by supervisors who may be involved in deciding on appointments when vacancies occur. It is unclear whether these posted listings disclose merely the projected positions on the eligibility register or also the final grade based on test scores and seniority.

Second, the appointing officials can draw some inferences about test scores from the Certification of Eligibles provided by the Board. Since the officials "assume"—an assumption which, to the extent pertinent, appears consistent with the actual practice of the Board—that the eligibles are listed on the certificate in the same order in which they appear on the Eligibility Register, the total of the converted test score and seniority points of the individual who, for example, is second on the certificate may be assumed to be higher than those for individuals lower on the certificate but less than that for the individual highest on the certificate. Appointing officials may

15. No dispute arises from the fact that at an earlier stage in these proceedings a city official did have this information regarding a particular position (Fire Lieutenant Examination, January 26, 1982). The official has explained by affidavit when and how this information was obtained and for what purpose it was used. In short, these items were procured by the city from the Board through discovery requests after a claim of reverse discrimination was made and were used only in the course of that proceeding.

16. These informal compilations are not necessarily reliable. As indicated in these same depositions, information may not be obtained from all applicants and the information provided by the applicants is not always accurate.

already know or be able to determine from city records how many seniority points various individuals on the certificate would have been awarded. By considering these seniority points, an appointing official could infer that a person would have had a higher converted test score than those individuals lower on the certificate with the same or a greater number of seniority points, and a lower converted test score than those higher on the certificate with the same or a lesser number of seniority points.[17] No such inference, however, could be drawn when comparing an individual with those lower on the certificate having fewer seniority points or with those higher on the certificate having more seniority points.

Knowledge of relative test scores, whether inferred from the certificate of eligibles or learned from information supplied by applicants, would not however establish that a particular applicant would be "demonstrably better qualified" than another with a lower score. That a test may be valid for both screening and ranking purposes does not mean that as between two individuals the one with the higher score is better qualified than the one with the lower score. Rather, the validity of a test is assessed in the context of its ability to make job-related measurements that are reliable and valid for groups of individuals. Any attempt to assess the relative qualifications of two individuals on the basis of their test scores is a risky process, and at a minimum requires knowledge of the magnitude of the difference in their scores if not also the significance of that difference given the characteristics of the measuring device. The need for such information under paragraph 2 of the consent decree is highlighted by the language of that paragraph relieving the city from its minority employment goals only if such minority applicants are "*demonstrably*" less qualified.[18] (Emphasis added.)

The "Rule of Three"—under which employing agencies have been empowered by state law to select any of the three

17. A limited additional inference could be drawn in such circumstances as to the magnitude of the difference; namely, the difference in converted test scores would have been no less than the difference in seniority points.

18. Of the common meanings of the word "demonstrably," the ones most suitable in this context are "obviously" or "clearly."

names submitted by the Board—implicitly recognizes this fundamental concept that the Board's tests, even if sufficiently job related when considered for a group of applicants, are not necessarily a proper measurement of relative qualifications of particular individuals. Under this rule, the city has been free to select the person on the certification with the lowest test score, and this has been true even though that person's test score may have been significantly lower than those of others certified. Moreover, given the role of seniority points, the persons certified for consideration might have converted test scores as much as twenty points below those of persons not certified for consideration and those with the highest test scores may not receive consideration until after many persons with lower scores have been selected.[19]

What this means is that the certification would not have provided city officials with sufficient information to relieve it from its obligation to meet the employment goals established by the decree. In turn, the plaintiffs in this reverse discrimination case cannot prevail on a claim that minority appointments were not required under paragraph 2 by relying on the limited knowledge about test results that could be derived from the Board's certifications.

The materials submitted by plaintiffs in opposition to the Rule 56 motion do, however, create a genuine issue as to the extent of knowledge that city officials may have had about actual test scores as a result of information provided by the employees themselves. It may be—although this appears very doubtful—that the city officials making (or recommending) promotions did on some occasions have sufficient reliable information about these test scores and about the significance of the differences in these scores to have been justified in not promoting a minority applicant. In such a circumstance, the unsuccessful white male may be able to establish, subject to

19. As an example, the person who received the highest test score on the January 1982 fire lieutenant exam had only 4 seniority points and was ranked 19th on the eligibility register.

providing additional proof regarding the validity of the test,[20] that the promotion of the minority applicant was not required by the decree and was in turn discriminatory. The court therefore cannot say at this time that the defendants are entitled to summary judgment against all efforts of plaintiffs to show information regarding test scores or that information regarding validity of these tests will necessarily be irrelevant.[21]

Although the pending motion for summary judgment is therefore due to be denied, the fact remains that the plaintiffs are not likely to prevail on this part of their reverse discrimination claims, in which event the validity of the Board's tests will not be relevant. Considering the substantial time and expense of discovery and trial that might be wasted on exploration of the validity of these tests, the court concludes (1) that under Fed. R. Civ. P. 42(b) issues regarding the validity of such tests should be severed for subsequent trial, as necessary, after resolution of the other issues in this litigation and (2) that under Fed. R. Civ. P. 26 further discovery into such issues should be deferred until after this initial trial.

As earlier noted, the United States has asked for permission to realign itself with the plaintiffs. The defendants oppose this request, noting that the decree (to which the United States was a party) provides as follows:

> "3. Remedial actions and practices required by the terms of, or permitted to effectuate and carry out the purposes of, this Consent Decree shall not be deemed discriminatory . . . and the parties hereto agree that they shall individually and jointly the [sic] defend the lawfulness of such remedial measures in the event of challenge

20. The court disagrees with the defendant's contention that paragraph 2 could apply only if the city officials at the time of making their selections also had detailed information supporting the validity of the tests.

21. Plaintiffs contend that, irrespective of its relevance on the city's defense premised on the consent decree, the validity of the tests may also be material in the plaintiffs' establishment of a prima facie case of discrimination (that test scores, if the tests were valid, would help prove they were qualified for the position filled by a minority applicant) or to show that any defense based on selection of the better qualified candidate would have been pretextual. While this may be true, it does not appear that the defendants in this litigation will be challenging the plaintiffs' qualifications or claiming that they selected the better qualified candidate.

by any other party to this litigation or by any other person or party who may seek to challenge such remedial measures through intervention or collateral attack.

. . . .

"54. Compliance with the terms and conditions of this Consent Decree shall constitute compliance by the City with all obligations arising under Title VII . . . as raised by the plaintiffs' complaints. Insofar as any of the provisions of this Consent Decree or any actions taken pursuant to such provisions may be inconsistent with any state or local civil service statute, law or regulation, the provisions of this Consent Decree shall prevail in accordance with the constitutional supremacy of federal substantive and remedial law."

To the extent the United States in good faith believes that actions of the city are discriminatory against the plaintiffs and are neither required nor permitted by the Consent Decree, it may support the plaintiffs' position in this litigation without violating the terms of the consent decree and accordingly may be allowed to align itself as a party plaintiff.

In its brief supporting the plaintiffs on these pending summary judgment motions, the United States has advanced arguments that appear to be contrary to its obligations under the Decree and inconsistent with positions it pressed so vigorously in the earlier litigation. It seems to be contending that promotion of a minority candidate with lower test scores would never be required by the Decree and would constitute a prima facie case of impermissible reverse discrimination and, indeed, that the city would have a duty to seek such information before considering appointment of a minority candidate. Such a position could hardly be consonant with its obligations to uphold the decree, which clearly contemplated that a portion of new appointments would go to minority candidates lower on the eligibility registers. Its apparent change in position is particularly questionable in view of the fact that it has contended—and documented with extensive evidence in the earlier litigation—that the tests have discriminatory impact against minority candidates and are not sufficiently job related to be

valid ranking devices under 42 U.S.C. § 2000e-2(h).[22] Although permitting the United States to align itself with the plaintiffs, the court will insist that the United States act in accord with its obligations under the Decrees.

This the18th day of February, 1985.

/s/ Sam C. Pointer, Jr.
United States District Judge

22. The United States might, of course, be justified in changing its position regarding the impact and validity of these tests if it had obtained new evidence demonstrating its earlier views were incorrect. There is no indication that any such new evidence has surfaced.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	CIVIL ACTION NO.
BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CV 84-P-0903-S

ORDER

In accordance with the accompanying Opinion, it is hereby ORDERED as follows:

1. The Motions for Partial Summary Judgment filed by the defendants are DENIED.

2. Pursuant to Fed. R. Civ. P. 42(b), issues regarding the effect and validity of Personnel Board tests are severed for subsequent trial after resolution of the other issues in this case.

3. All discovery pertaining to the effect and validity of such tests is deferred until completion of the initial trial.

4. The United States' Motion to Strike Affidavits or Portions Thereof is DENIED.

5. The United States' Motion to Realign as a Party-Plaintiff in *Bennett v. Arrington*, CV 82-P-0850-S is GRANTED, subject however, to the limitations discussed in the accompanying Opinion.

This the 18th day of February, 1985.

/s/ Sam C. Pointer, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	CIVIL ACTION NO.
BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CV 84-P-0903-S

MOTION TO INTERVENE AS PARTIES PLAINTIFF

Comes now David L. Hamilton, Randy E. Woods, Stanley D. Rogers, James R. Pharris, William V. Sulser, Jr., Ronald Vaughn, Rex Earl Keeling, Mike C. Thomas, Kenneth W. Smith, John E. Courington, and Barry Dale Bartlett and respectfully move this court of leave to intervene as parties plaintiff in this cause, pursuant to Rules 24a and 24b, Federal Rules of Civil Procedure. In support thereof, Movants state:

(1) Movants are all white male employees of the defendant, City of Birmingham. Movants present claims substantiallay [sic] identical to the claims of the original plaintiffs in this action in that Movants were denied promotions on the basis of their race, and Movants have been similarly damaged by the Personnel Board Defendant's practices of certification on the basis of race.

(2) The Movants claim an interest in the transactions which are the subject of this action in that Movants seek to challenge as illegal and unconstitutional the actions of the defendants in the same manner as the original Plaintiffs, the Movants present the same arguments as the original Plaintiffs, the Movants have been victims of the same practices as the original Plaintiffs, and the Movants seek relief similar to that of the original Plaintiffs.

(3) Disposition of this action without Movant's participation may, as a practical matter, impair or impede the ability of Movants to protect their interests.

(4) The interests of Movants are not adequately represented by the original Plaintiffs in that said parties may not adequately seek all relief available to the Movants upon a finding of liability.

(5) The Movants [sic] claims represent common questions of law and fact with the claims of the original Plaintiffs.

(6) Filed herewith is a proposed complaint in intervention.

/s/ Ralph E. Coleman
Ralph E. Coleman
2175 - 11 Court South
Birmingham, Alabama 35205

[Certificate of Service, dated February 19, 1985, and exhibits omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

ANSWER OF THE DEFENDANT, PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA, TO THE AMENDED COMPLAINT IN INTERVENTION OF HOWARD E. POPE

Come now the defendants, Hiram Y. McKinney, James B. Johnson, and Roderick Beddow, Jr., and the Personnel Board of Jefferson County (hereinafter collectively the "Board"), and answer the identically numbered paragraphs in plaintiff Pope's amended complaint as follows:

1. The Board admits that this court has jurisdiction over the case under the stated statutory sections, but denies that it has taken any action that violates any of plaintiff's rights.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. The Board admits that Hiram Y. McKinney, James B. Johnson, and Roderick Beddow, Jr., are members of the Personnel Board, and, as such, they are responsible generally for its administration and operation, including the procurring and reviewing of applications and certification of eligibles for appointment with defendants named in paragraphs (3) and (4).

7. The Board relies upon the answer of the defendant, City of Birmingham, in regard to this averment.

8. Admitted.

9. The Board is without sufficient knowledge to admit or deny the averments of this paragraph.

10. Denied.

11. There is no paragraph 11.

12. The Board is without sufficient knowledge to admit or deny the averments of this paragraph.

13. The Board entered into a Consent Decree which was approved by the United States District Court for the Northern District of Alabama, Southern Division, in Case No. CV-75-P-0666-S, and has made race conscious certifications pursuant to this Consent Decree, as is required by the Consent Decree. As such, qualifications are now no longer made "solely on the basis of merit, competition, and superior qualifications." If these actions by the Board are deemed to be favoring blacks to the detriment of whites, then the Board admits the averments of paragraph 13 of the complaint. Otherwise, the Board denies the averments of paragraph 13.

14. The Board admits that it will continue to pursue its policies and practices in accordance with the Board's Enabling Act and Consent Decree. The Board denies the remaining averments of the paragraph.

DEFENSES

15. All of the actions taken by the Board concerning the above-referenced averments were taken pursuant to and in accordance with the Consent Decree entered by the United States District Court for the Northern District of Alabama, Case No. CV 75-P-0666-S, and related cases, and therefore the Board is not liable for any acts complained of in the complaint.

16. The complaint is barred by the doctrine of collateral estoppel.

17. The complaint is barred by the doctrine of res judicata.

18. All of the actions referred to above were taken by the Board in full conformity with all applicable constitutional provisions, statutes, laws, regulations, and court orders and decrees.

19. All of the Board's actions were made in accordance with the validly approved Consent Decree. Since all of the Board's actions were taken in accordance with the validly approved Consent Decree, the Board is immune from liability for its actions made pursuant thereto. As the Consent Decree permits and requires race conscious selection procedures and practices, the Board is immune from liability even though it uses race conscious selection procedures and practices.

/s/ David P. Whiteside, Jr.
David P. Whiteside, Jr.

/s/ Michael L. Hall
Michael L. Hall

Attorneys for the Personnel Board
of Jefferson County, Alabama

OF COUNSEL:

JOHNSTON, BARTON, PROCTOR,
SWEDLAW & NAFF
1100 Park Place Tower
Birmingham, Alabama 35203
205/322-0616

[Certificate of Service, dated February 26, 1985, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

PERSONNEL BOARD'S ANSWER
TO THE COMPLAINT OF
JAMES A. BENNETT

Come now the defendants, the Personnel Board of Jefferson County, James W. Fields, as Director of Personnel of the Personnel Board of Jefferson County (and successor in office to Joseph W. Curtin), Hiram Y. McKinney, James B. Johnson, and Roderick Beddow, Jr., in their official capacities as members of the Personnel Board of Jefferson County (Mr. Beddow is substituted for the late Henry P. Johnston), and answer the complaint of James A. Bennett and others filed in this cause on April 14, 1982, by answering the identically numbered paragraphs of plaintiffs' complaint as follows:

1. The Board admits that this Court has jurisdiction over this case under the stated statutory sections, but denies that it has taken any action that violates any of plaintiffs' rights.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. The Board admits that Hiram Y. McKinney, James B. Johnson, and Roderick Beddow, Jr. are the members of the Personnel Board and that James W. Fields is Director of Personnel of the Personnel Board and, as such, they are responsible generally for the administration and operation.

7. The Board relies upon the answer of the defendant City of Birmingham in regard to this averment.

8. Admitted.

9. Admitted.

10. Admitted.

11. Admitted.

12. The Board is without sufficient knowledge to admit or deny the averments of this paragraph.

13. The Board entered into a Consent Decree which was approved by the United States District Court for the Northern District of Alabama, Southern Division, in Case No. CV 75-P-0666-S, and has made race conscious certifications pursuant to this Consent Decree, as is required by the Consent Decree. As such, certifications made by the Board are no longer made "solely on the basis of merit, competition and superior qualifications." If these actions by the Board are deemed to be favoring blacks to the detriment of whites, then the Board admits the averments of paragraph 13 of the complaint. Otherwise the Board denies the averments of paragraph 13.

14. The Board admits that it is certifying candidates on the basis of race under the protection of the Consent Decrees entered into and approved by this Court in Case Nos. 75-P-0666-S, 74-Z-17-S, and 74-Z-12-S. The Board denies the remaining averments of paragraph 14 of the complaint.

15. Denied.

16. Denied.

17. Denied.

18. The averments of paragraph 18 of the complaint are no longer relevant.

19. Admitted.

20. The averments of paragraph 20 of the complaint are no longer relevant.

21. Denied.

22. The Board denies that plaintiffs are entitled to any relief against the Board.

DEFENSES

23. All of the actions taken by the Board concerning the above-referenced averments were made pursuant to and in accordance with a Consent Decree that was entered by the United States District Court for the Northern District of Alabama, Southern Division, Case No. CV 75-P-0666-S, and related cases, and therefore the Board is not liable for any of the acts complained of in the complaint.

24. The complaint is barred by the doctrine of collateral estoppel.

25. The complaint is barred by the doctrine of res judicata.

26. All of the actions referred to above were taken by the Board in full conformity with all applicable constitutional provisions, statutes, laws, regulations, court orders, and decrees.

27. All of the Board's actions were made in accordance with the validly approved Consent Decree. Since all of the Board's actions were taken in accordance with the validly approved Consent Decree, the Board is immune from liability for its actions made pursuant thereto. As the Consent Decree permits and requires race conscious selection procedures and practices, the Board is immune from liability even though it uses race conscious selection procedures and practices.

/s/ David P. Whiteside, Jr.
David P. Whiteside, Jr.

/s/ Michael L. Hall
Michael L. Hall

Attorneys for the Personnel Board
of Jefferson County, Alabama

OF COUNSEL:

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SWEDLAW & NAFF
1100 Park Place Tower
Birmingham, Alabama 35203
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[Certificate of Service, dated February 26, 1985, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	
BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

PERSONNEL BOARD'S ANSWER TO THE COMPLAINT IN INTERVENTION OF JOHN E. GARVICH, JR.

Come now the Personnel Board of Jefferson County, Alabama, its members and director, and answer the complaint in intervention of John E. Garvich, Jr., James W. Hinson, and Robert Bruce Millsap by answering the identically numbered paragraphs in plaintiffs' complaint in intervention as follows:

1. The Board adopts by reference its answers to paragraphs 1 through 15 of the complaint, as amended, of Robert K. Wilks, et al., which answer was filed on October 18, 1983.

2. The Board relies upon the answer of defendant, City of Birmingham, in regard to the averments of paragraph 2. The Board denies that plaintiffs are entitled to any relief against the Board.

/s/ David P. Whiteside, Jr.
David P. Whiteside, Jr.

/s/ Michael L. Hall
Michael L. Hall

Attorneys for the Personnel Board
of Jefferson County, Alabama

OF COUNSEL:

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1100 Park Place Tower
Birmingham, Alabama 35203
205/322-0616

[Certificate of Service, dated February 26, 1985, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

PERSONNEL BOARD'S ANSWER TO THE COMPLAINT IN INTERVENTION OF THE UNITED STATES OF AMERICA

Come now the Personnel Board of Jefferson County, Alabama, its members and director, and answer the complaint in intervention of the United States of America as follows:

1. The Board admits that this Court has jurisdiction over the case under the stated statutory sections, but denies that it has taken any actions that violate any of those statutes.

2. The Board admits that this Court has jurisdiction over the case under the stated statutory sections, but denies that it has taken any action that violates any of plaintiffs' rights.

3. The Board admits the averments of paragraph 3 except that it states that (1) *Bennett* was filed on April 14, 1982, (2) by order dated April 14, 1984, all of these cases were consolidated in a case titled "In Re: Birmingham Reverse Discrimination Employment Litigation," CV 84-P-0903-S, and (3) since and before April 2, 1984, other individual members of the Birmingham Fire and Rescue Service have sought and have been granted leave to intervene in *Wilks*, but not in *Bennett*.

4. Admitted.

5. Admitted.

6. The Board relies upon the answer of the defendant, City of Birmingham, in regard to this averment.

7. Admitted.

8. Admitted.

9. The Board is without sufficient knowledge to admit or deny the averments of this paragraph.

10. The Board is without sufficient knowledge to admit or deny the averments of this paragraph.

11. The Board admits that the United States, through the Department of Justice, has investigated the employment practices of the defendant but is without knowledge to admit or deny the rest of the averments.

12. The Board is without sufficient knowledge to admit or deny the averments of this paragraph. The Board denies that the plaintiffs or the plaintiff in intervention, the United States, is entitled to any relief against the Board.

DEFENSES

13. All of the actions taken by the Board concerning the above-referenced averments were taken pursuant to and in accordance with the Consent Decree entered by the United States District Court for the Northern District of Alabama, Case No. CV 75-P-0666-S, and related cases, and therefore the Board is not liable for any acts complained of in the complaint.

14. The complaint is barred by the doctrine of collateral estoppel.

15. The complaint is barred by the doctrine of res judicata.

16. All of the actions referred to above were taken by the Board in full conformity with all applicable constitutional provisions, statutes, laws, regulations, court order, and decrees. The complaint in intervention fails to state a claim against these defendants.

17. All of the Board's actions were made in accordance with the validly approved Consent Decree. Since all of the

Board's actions were taken in accordance with the validly approved Consent Decree, the Board is immune from liability for its actions made pursuant thereto. As the Consent Decree permits and requires race conscious selection procedures and practices, the Board is immune from liability even though it uses race conscious selection procedures and practices.

/s/ David P. Whiteside, Jr.
David P. Whiteside, Jr.

/s/ Michael L. Hall
Michael L. Hall
Attorneys for the Personnel Board
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OF COUNSEL:

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[Certificate of Service, dated February 26, 1985, omitted]

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

PERSONNEL BOARD'S ANSWER TO AMENDMENT OF COMPLAINT OF VICTOR ZANNIS

Come now Hiram Y. McKinney, James B. Johnson, and Roderick Beddow, Jr., in their official capacities as members of the Personnel Board of Jefferson County, and James W. Fields, in his official capacity as Director of the Personnel Board of Jefferson County, and the Personnel Board of Jefferson County (hereinafter collectively referred to as the "Board"), and answer the identically numbered paragraphs in plaintiff Victor Zannis's amendment to complaint as follows:

15. The Board hereby adopts by reference its answers to paragraphs 1 through 14 of plaintiff's complaint as are fully set forth herein.

16-18. The Board admits that plaintiff Zannis was disciplined by the defendant City of Birmingham, but avers that plaintiff Zannis appealed the imposition of the discipline to the defendant Board. Pursuant to Section 22 of the Enabling Act, as most recently amended by Acts No. 679 and 684, *1977 Ala. Acts*, the Board heard his appeal. After hearing all of the evidence at a hearing held on July 8, 1983, the Board ruled:

> [I]t is the opinion and decision of the Board that the action of Chief Arthur V. Deutcsh, Birmingham Police Department, suspending said Peter J.V. Zannis for six (6) days, effective June 1, 1983, is hereby rescinded, and he shall receive full back pay for this period.

This decision by the Board was issued on July 15, 1983. The Board is without knowledge to admit or deny the remaining averments of these paragraphs.

19. The Board is without knowledge to admit or deny the averments of this paragraph.

20. The Board relies upon the answer of the defendant City of Birmingham in regard to the averments of this paragraph.

21. The Board is without knowledge to admit or deny the averments of this paragraph.

22. The Board admits that plaintiff Zannis is in receipt of a Right-to-Sue letter from the EEOC. The Board denies the remaining averments of this paragraph.

DEFENSES

23. The Board reavers and reincorporates its defenses I-VII which appear in its answer to the complaint.

24. Count Two fails to state a claim against the Board on which relief can be granted.

/s/ David P. Whiteside, Jr.
David P. Whiteside, Jr.

/s/ Michael L. Hall
Michael L. Hall

Attorneys for the Personnel Board
of Jefferson County, Alabama

OF COUNSEL:

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1100 Park Place Tower
Birmingham, Alabama 35203
205/322-0616

[Certificate of Service, dated February 26, 1985, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

[In re: Zannis, *et al.* v. Arrington, *et al.*]

MOTION TO INTERVENE AND COMPLAINT IN INTERVENTION OF RAYMOND V. MARTIN

1. Raymond V. Martin moves the Court for leave to intervene as an additional party plaintiff.

2. Martin is a white male Birmingham Police Officer who has been denied promotion in a manner similar to the original plaintiffs in that he was denied promotion to the classification of Police Sergeant due to his race and sex.

3. Upon the granting of this motion, Martin adopts by reference all of the allegations of the original Complaint in *Zannis v. Arrington* by reference and prays for the same relief as requested therein for himself.

WHEREFORE, Martin respectfully moves for leave to intervene as an additional party plaintiff and further requests that he be permitted to adopt the original Complaint as his Complaint in Intervention.

/s/ Raymond P. Fitzpatrick, Jr.
RAYMOND P. FITZPATRICK, JR.
Attorney for Proposed
Intervening Plaintiff
Raymond V. Martin

OF COUNSEL:

FITZPATRICK & JORDAN
1009 Park Place Tower
Birmingham, Alabama 35203
Telephone 205/252-4660

[Certificate of Service, dated March 4, 1985, omitted]

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

ORDER

Upon consideration of the pending motions in this case, it is hereby ORDERED as follows:

(1) The motion of the United States to strike portions of the supplemental affidavit of W. Gordon Graham is DENIED.

(2) The motion to intervene as parties-plaintiff on behalf on [sic] David L. Hamilton, Randy E. Woods, Stanley D. Rogers, James R. Pharris, William V. Sulser, Jr., Ronald Vaughn, Rex Earl Keeling, Mike C. Thomas, Kenneth W. Smith, John E. Courington, and Barry Dale Bartlett is GRANTED, and these parties are given leave to intervene in *Garner v. City of Birmingham*, CV 82-P-1461-S.

(3) The time within which the defendants must respond to the claims of these intervening plaintiffs is SUSPENDED until twenty (20) days after completion of the first trial in this case, or until otherwise ordered by the court.

This the 7th day of March, 1985.

/s/ Sam C. Pointer, Jr.
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S
ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-P-2116-S

AMENDED ANSWER AND COUNTERCLAIMS OF DEFENDANTS RICHARD ARRINGTON, JR. AND THE CITY OF BIRMINGHAM TO THE COMPLAINT IN INTERVENTION OF THE UNITED STATES

Defendants Richard Arrington, Jr., and the City of Birmingham (collectively "the City") respond to the complaint in intervention filed by the United States of America in CV-83-P-2116-S (hereafter "complaint") as follows:

FIRST DEFENSE

The complaint fails to state a claim against these defendants upon which relief may be granted.

SECOND DEFENSE

The complaint constitutes an impermissible collateral attack upon: (1) the "Consent Decree With The City Of Birmingham" entered by this Court in Civil Action Nos. 75-P-0666-S, 74-Z-17-S and 74-Z-12-S ("City Decree") and (2) the "Consent Decree With the Jefferson County Personnel Board" entered by this Court in Civil Action Nos. 75-P-0666-S, 74-Z-17-S and 74-Z-12-S ("Board Decree").

THIRD DEFENSE

The complaint is in flagrant violation of the obligation of the United States, imposed by the City Decree, to defend the lawfulness of all remedial actions and practices required or permitted by the City Decree.

FOURTH DEFENSE

The complaint is barred by the City Decree and by the Board Decree.

FIFTH DEFENSE

The City's consideration of the race of competing candidates for promotions to fire lieutenant and fire captain positions within the Birmingham Fire and Rescue Service was a direct consequence of the City Decree and was authorized, required or permitted by the City Decree to which the United States is a party.

SIXTH DEFENSE

The United States has waived its right to invoke the jurisdiction of this Court and to seek relief for the claims alleged in the complaint.

SEVENTH DEFENSE

In the City Decree, the United States represented that (1) it would defend the lawfulness of the "[r]emedial actions and practices required by the terms of, or permitted to effectuate and carry out the purposes of" the City Decree and (2) compliance with the City Decree would "constitute compliance by the City with all obligations arising under Title VII of the Civil Rights Act of 1964, as amended, the State and Local Fiscal Assistance Act of 1972, as amended, the Omnibus Crime Control and Safe Streets Act of 1968, as amended, the Civil Rights Acts of 1866 and 1871, 42 U.S.C. § 1981 and § 1983, and the Fourteenth Amendment to the Constitution of the United States." In reliance on the representations of the United States, and at the request of the United States, the City executed the City Decree and, where appropriate, made numerous race and gender conscious personnel decisions pursuant to its terms. The United States is estopped from invoking the jurisdiction of this Court and from litigating the matters addressed in the complaint all of which involve remedial actions authorized, required or permitted by the terms of the City Decree.

EIGHTH DEFENSE

To the extent that the United States contends that the race-conscious promotion decisions of the City challenged in the complaint were not authorized, required or permitted by the City Decree, the United States has failed to satisfy the preconditions to litigation of such claims specified by ¶ 4 of the City Decree.

NINTH DEFENSE

The complaint is an abuse of process which is intended to coerce the City to abandon or compromise its obligations under the City Decree which the City accepted at the request of the United States.

TENTH DEFENSE

The United States has failed to satisfy the preconditions to suit against the City under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq*. Specifically, the United States has failed to: (a) file charges of employment discrimination against the City, (b) conduct an investigation of the alleged unlawful employment practices of the City, (c) enter findings that it has reasonable cause to believe that the City has engaged in a pattern and practice of unlawful employment discrimination, (d) provide notice to the City of such findings, and (e) engage in conciliation efforts with the City, all as required by 42 U.S.C. §§ 2000e-5 and 2000e-6 and Section 5 of Reorganization Plan No. 1 of 1978, [1978] *U.S. Code Cong. & Admin. News*, 9795, 9800.

ELEVENTH DEFENSE

The City is immune from liability in this action pursuant to Section 713(b)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-12(b)(1), and the Affirmative Action Guidelines issued by the Equal Employment Opportunity Commission ("EEOC") on January 19, 1979, 29 C.F.R. §§ 1608.2 and 1608.8.

TWELFTH DEFENSE

The conduct of the City challenged by the United States is permitted by the Affirmative Action Guidelines issued by the EEOC on January 19, 1979, 29 C.F.R. § 1608, *et seq*. The United States is barred from asserting a construction of Title VII of the Civil Rights Act of 1964, as amended,

42 U.S.C. § 2000e, *et seq.*, which fails to conform with said Guidelines.

THIRTEENTH DEFENSE

The United States lacks standing to sue these defendants pursuant to 42 U.S.C. §§ 1981 and 1983.

FOURTEENTH DEFENSE

For further answer to the numbered paragraphs of the complaint, the City:

1. Denies the allegations of paragraphs 1, 2, 11 and 12.

2. Admits the allegations of paragraphs 4, 5, 6 and 7.

3. Admits the allegations of paragraph 3 except that: (1) *Bennett* was filed on April 14, 1982, (2) the correct case number for *Wilks* is CV-83-P-2116-S, (3) by order dated April 14, 1984, a master case file for the consolidated cases was established under the caption "In re: Birmingham Reverse Discrimination Employment Litigation," CV-84-P-0903-S, and (4) since and before April 2, 1984, other individual members of the Birmingham Fire and Rescue Service have sought and have been granted leave to intervene in *Wilks*, but not in *Bennett*.

4. Admits the allegations of the first sentence of paragraph 8, but denies the remaining allegations contained therein.

5. Admits that it has received revenue sharing allocations from the United States Treasury pursuant to the State and Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. § 6717, *et seq.*, but denies the remaining allegations of paragraph 9.

6. Denies the allegations of paragraph 10, but admits that it has considered the race and gender of competing promotional candidates in making promotions to Fire Lieutenant and Fire Captain positions to the extent authorized, required or permitted by the City Decree. The City avers that all of its race conscious promotion decisions were made as a direct consequence of the City Decree and pursuant to its terms.

7. Denies that the United States is entitled to any relief whatsoever.

8. Except as expressly admitted, the City denies the allegations of the complaint.

WHEREFORE, these defendants demand a judgment in their favor and an award of costs and attorneys' fees incurred in the defense of the complaint.

* * *

/s/ James K. Baker
James K. Baker

City Attorney
City of Birmingham
600 City Hall
Birmingham, Alabama 35202
(205) 254-2369

/s/ Robert K. Spotswood
James P. Alexander
Robert K. Spotswood
Gregory H. Hawley

Attorneys for Defendants
Richard Arrington, Jr., and
the City of Birmingham

OF COUNSEL:

BRADLEY, ARANT, ROSE & WHITE
1400 Park Place Tower
Birmingham, Alabama 35203
(205) 252-4500

[Certificate of Service, dated March 11, 1985, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	
BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

[In re: William L. Garner, *et al.* v. City of Birmingham, Birmingham Street and Sanitation Department]

MOTION TO INTERVENE AND COMPLAINT IN INTERVENTION OF DONALD VAUGHN

1. Donald Vaughn moves the Court for leave to intervene as an additional party plaintiff.

2. Vaughn is a white male employee of the City of Birmingham Street and Sanitation Department who has been denied promotion in a manner similar to the original plaintiffs in that he was denied promotion to the position of construction equipment operator due to his race and sex.

3. Upon the granting of this motion, Vaughn adopts by reference all of the allegations of the original Complaint in William L. Garner, et al v. City of Birmingham, Birmingham Street and Sanitation Department by reference and prays for the same relief as requested therein for himself.

WHEREFORE, Vaughn respectfully moves for leave to intervene as an additional party plaintiff and further requests that he be permitted to adopt the original Complaint as his Complaint in Intervention.

/s/ Ralph E. Coleman
Ralph E. Coleman
Attorney for Proposed
Intervening Plaintiff
Donald Vaughn

OF COUNSEL:

Ralph E. Coleman
2175 11th Ct. S.
Birmingham, AL 35205
Telephone: (205) 939-0444

[Certificate of Service, dated April 10, 1985, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	
BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

ORDER

Upon consideration at the court's motion docket of the pending motions in this case, it is hereby ORDERED as follows:

(1) The motion to admit Frederick Linton Medlin pro hac vice is GRANTED.

(2) The motion to intervene on behalf of Raymond V. Martin in *Zannis v. Arrington*, CV 83-P-2680-S, is GRANTED, but the time within which the defendants must file an answer or responsive pleading is suspended until twenty days following completion of the first trial in this case.

(3) The motion to intervene on behalf of Donald Vaughn in *Garner v. City of Birmingham*, 82-P-1461-S, is GRANTED, but the time within which the defendants must file an answer or responsive pleading is suspended until twenty days following completion of the first trial in this case.

(4) The motion to amend filed on behalf of the defendants Richard Arrington, Jr. and the City of Birmingham in *Wilks v. Arrington*, CV 83-P-2116-S, is GRANTED.

This the 17th day of April, 1985.

/s/ Sam C. Pointer, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In Re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S
ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-P-2116-S
PETER JAMES VICTOR ZANNIS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-P-2680-S
JAMES A. BENNETT, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-0850-S
BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-1852-S

AMENDMENT TO ANSWERS

Comes now one of the defendants, the Personnel Board of Jefferson County, Alabama (the "Board"), and hereby files this Amendment to Answers of the following complaints:

1. Robert K. Wilks, CV 83-P-2116-S.
2. Howard E. Pope in intervention, CV 83-P-2116-S.
3. John E. Garvich in intervention, CV 83-P-2116-S.
4. United States of America in intervention, CV 83-P-2116-S and CV 82-850-S.
5. James A. Bennett, CV 82-P-850-S.
6. BACE, CV 82-P-1852-S.
7. Peter James Victor Zannis, CV 83-P-2680-S.

FIRST ADDITIONAL DEFENSE

21. The Board adopts and realleges all the averments of its previous Answer and any previous amendments thereto as if they were set forth herein in their entirety.

22. Section 713(b) of Title VII of The Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-12(b), provides:

> In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission. . .

23. The Section 1608.2 of the Affirmative Action Guidelines issued by the Equal Employment Opportunity Commission, 29 C.F.R. § 1608 *et seq*., provides in pertinent part:

> These Guidelines constitute "a written interpretation and opinion" of the Equal Employment Opportunity Commission as that term is used in Section 713(b)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-12(b)(1). . . .

24. Section 1608.8 of the Affirmative Action Guidelines, 29 C.F.R. § 1608.8, provides:

> Parties are entitled to rely on orders of courts of competent jurisdiction. If adherence to an Order of a United States District Court or other court of competent jurisdiction, whether entered by consent or after contested litigation, in a case brought to enforce a Federal, state or local equal employment opportunity law or regulation, is the basis of a complaint filed under Title VII or is alleged to be the justification for an action which is challenged under Title VII, the Commission will investigate to determine: (a) Whether such an Order exists and (b) whether adherence to the Affirmative Action Plan which is part of the Order was the basis of the complaint or justification. If the Commission so finds it will issue a determination of no reasonable cause. The Commission interprets Title VII to mean that actions taken pursuant to the direction of a Court Order cannot give rise to liability under Title VII.

25. The conduct of the Board challenged by the plaintiffs, the plaintiffs in intervention, and the United States in intervention is lawful and protected by 42 U.S.C. § 2000e-12(b) and the Affirmative Action Guidelines.

/s/ David P. Whiteside, Jr.
David P. Whiteside, Jr.

/s/ Michael L. Hall
Michael L. Hall

Attorneys for the Personnel Board
of Jefferson County, Alabama

OF COUNSEL:

JOHNSTON, BARTON, PROCTOR,
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1100 Park Place Tower
Birmingham, Alabama 35203
205/322-0616

[Certificate of Service, dated May 3, 1985, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S
PETER J. ZANNIS, *et al.*, *Plaintiffs*, UNITED STATES OF AMERICA, *Plaintiff-Intervenor*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-P-2680-S

COMPLAINT IN INTERVENTION

The United States of America, plaintiff-intervenor, by Edwin Meese III, Attorney General, alleges:

1. This complaint is filed by the Attorney General on behalf of the United States to enforce the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*), as amended by the Equal Employment Opportunity Act of 1972 (Pub. L. 92-261, March 24, 1972); to enforce the nondiscrimination provisions of the State and Local Fiscal Assistance Act of 1972, as amended (31 U.S.C. § 6716); and for the purpose of protecting and enforcing rights guaranteed by the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. §§ 1981, 1983.

2. The Court has jurisdiction of this matter pursuant to 42 U.S.C. § 2000e-6, 28 U.S.C. § 1345, and 31 U.S.C. § 6720.

3. The *Zannis, et al.* v. *Arrington, et al.*, CV 83-P-2680-S, action was commenced by Peter J. Zannis, Harold H. Benson, Jr., Michael G. Shepherd, Ancel B. Swindall, Wayne S. Whisenhunt, Jimmy L. Wesson, and Michael Shores on November 7, 1983. On April 2, 1984, this action was consolidated with other actions under *In Re: Birmingham Reverse Discrimination Employment Litigation*, CV 84-P-0903-S. Other individual employees of the Birmingham Police Department have sought and have been granted leave to intervene in these cases as plaintiffs.

4. Plaintiffs are all residents of Jefferson County, Alabama, and all individual plaintiffs are over the age of twenty-one years.

5. Defendant City of Birmingham is a political subdivision of the State of Alabama and an employer within the meaning of 42 U.S.C. § 2000e(b), as amended.

6. Defendant Richard Arrington, Jr., is Mayor of the City of Birmingham and is responsible for the administration and operation of the city government of Birmingham, including the hiring, assigning, and promoting of employees of the City.

7. The defendants enumerated in paragraphs 5 and 6 have received revenue sharing allocations from the United States Treasury pursuant to the nondiscrimination provisions of the State and Local Fiscal Assistance Act of 1972, as amended (31 U.S.C. § 6716 et seq.).

8. Defendant Jefferson County Personnel Board is an agency of Jefferson County established pursuant to the laws of the State of Alabama (Act No. 248 of the 1945 Alabama Legislature, as amended, hereinafter referred to as the "Enabling Act"), and is an employer within the meaning of 42 U.S.C. § 2000e(b). Defendant Jefferson County Personnel Board is engaged in the procuring and screening of applicants for promotion, in the certification of eligibles for promotion to the defendants named in paragraphs 5 and 6, and is further engaged in the administration of a civil service system for such defendants.

9. Plaintiffs are all white, male employees of the Police Department of the City of Birmingham. Pursuant to the provisions of the Enabling Act, plaintiffs have applied for, and taken examinations for promotion to the classifications of Police Sergeant and/or Police Lieutenant of the Birmingham Police Department.

10. Defendants City of Birmingham and Richard Arrington, Jr., have pursued and continue to pursue policies and practices that discriminate against white males and that deprive or tend to deprive white males of employment opportunities in promotional positions within [the] Police Department because of their race and/or sex. Defendants implement these policies and practices, among other ways, as follows:

a. By following a practice of promoting black and/or female employees to the position of Police Sergeant in the Birmingham Police Department in preference to demonstrably better qualified white male employees of the Police Department;

b. By promoting within the Birmingham Police Department black and/or female candidates over white male candidates exclusively on the basis of race or sex without regard to relative qualifications; and

c. By refusing or failing to take appropriate action to eliminate discrimination against white, male employees certified as eligible by the Jefferson County Personnel Board who were and are seeking promotions within the Birmingham Police Department.

11. In accordance with Section 707 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-6, the United States, through the Department of Justice, has investigated the employment practices of the defendants and has attempted to eliminate the policies and practices described in paragraph 10 above and has attempted to eliminate those policies and practices through negotiation and settlement.

12. The policies and practices of the defendants, described in Paragraph 10 above, constitute a pattern or practice of resistance to the full enjoyment by white males of their right to equal employment opportunities without discrimination based upon race or sex. This pattern or practice is of such a nature and is intended to deny the full exercise of the rights secured by Title VII of the Civil Rights Act of 1964, as amended, and is in violation of the obligations imposed by the State and Local Fiscal Assistance Act of 1972, as well as rights guaranteed by the Fourteenth Amendment to the Constitution of the United States and by 42 U.S.C. §§ 1981 and 1983. Unless restrained by order of this Court, the defendants will continue to pursue policies and practices the same as or similar to those alleged in this Complaint.

WHEREFORE, plaintiff-intervenor prays for an Order permanently enjoining the defendants, Richard Arrington, employees, successors, and all persons in active concert or participation with them from:

(a) making promotions within the Birmingham Police Department based on race or sex without regard to relative qualifications of promotional candidates;

(b) failing to make compensatory payments, to award retroactive seniority, and to award future promotional priority to rejected white, male promotional candidates who have been victimized by the practices described in paragraph 10 above; and

(c) failing to take other appropriate measures to overcome the present effects of past discriminatory policies and practices.

Plaintiff-Intervenor prays for such other additional relief as justice may require, together with its costs in this action.

EDWIN MEESE III
Attorney General

/s/ William Bradford Reynolds
WILLIAM BRADFORD REYNOLDS
Assistant Attorney General

/s/ Charles J. Cooper
CHARLES J. COOPER
Deputy Assistant Attorney General

FRANK W. DONALDSON
United States Attorney for the
Northern District of Alabama

/s/ Mary E. Mann
MARY E. MANN
Special Litigation Counsel

/s/ William R. Worthen
WILLIAM R. WORTHEN
Attorney
U.S. Department of Justice
Civil Rights Division
10th and Pennsylvania Ave., N.W.
Washington, D.C. 20530
(202) 633-3706

[Certificate of Service, dated May 16, 1985, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S
BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-1852-S

MOTION OF UNITED STATES TO REALIGN AS PARTY-PLAINTIFF

The United States of America respectfully moves the Court for leave to realign as a party-plaintiff in *Birmingham Association of City Employees, et al.* v. *Richard Arrington, Jr., et al.*, CV 82-P-1852-S, and to substitute its Complaint-in-Intervention filed herewith for its Answer previously filed.

A Memorandum in support of this Motion and Certificate of Plaintiffs' Counsel are attached hereto and incorporated herein.

WHEREFORE, the United States prays that its Motion be granted.

WILLIAM BRADFORD REYNOLDS
Assistant Attorney General

/s/ Charles J. Cooper
CHARLES J. COOPER
Deputy Assistant
Attorney General

FRANK W. DONALDSON
United States Attorney for
the Northern District of
Alabama Federal Courthouse
Birmingham, Alabama 35203

/s/ Mary E. Mann
MARY E. MANN
Special Litigation Counsel

/s/ William R. Worthen
WILLIAM R. WORTHEN
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[Certificate of Service, dated May 16, 1985, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

CAPTION

WHEREUPON, motions in the above styled cause came on to be heard before the Hon. Sam C. Pointer, Jr., Judge, in his chambers at the Federal Courthouse, Birmingham, Alabama, on the 3rd day of July, 1985, commencing at 8:15 a.m., when the following proceedings were had and done:

* * *

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THE COURT: . . . . I think once that is done, that area is going to die and we are going to continue to go forward with the case in other areas, which is essentially what does the decree say and as to what degree does what the decree says constitute a good defense and a reverse discrimination given the law of the country at this time, that is I think the way we are going to end up.

* * *

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MR. JOFFE: Your Honor, I think the only thing that is left, Your Honor, is our motion to compel further interrogatory answers of the private plaintiffs.

THE COURT: Of the private plaintiffs?

MR. JOFFE: Essentially what is at issue is is [sic] how much do they have to tell us about their case before the pretrial order. Essentially our interrogatories say on what do you base your claims that your people are demonstrably better qualified than the people who were promoted and to the extent they answered, they answered by saying all the depositions and

documents produced to date, and we won't tell you whether there's anything else that we intend to rely on because it is premature until the pretrial order.

The problem that we have is that while thousands and thousands of pages of depositions have been taken and documents have been produced, maybe it is our own lack of skill,

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but we haven't found anything in there that goes to the issue that you set forth in your February opinion is the issue to be tried; that is, that the City had knowledge that the people who were promoted were demonstrably less qualified by a job-related test.

So this isn't the kind of case, a slip and fall case where someone has testified they saw a banana peel in the grocery store and we now know what the evidence against us is and we can go out and see if we can get witnesses or testimony to the contrary.

We really have no idea based on their answers on what they are going to rely. It seems to us we are entitled to that so that we can see whether we need further discovery.

MR FITZPATRICK: Your Honor, I disagree with Mr. Joffe's characterization of the issue to be tried. I think your February 19th order speaks for itself as well as the matters that we discussed at the last status meeting.

* * *

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MR. JOFFE: Could the plaintiff indicate how long he thinks his case is going to take? Are we talking about a three-day case or a three-week case?

MR. FITZPATRICK: I think a lot of that depends upon what—perhaps tightening up the February 19th order with respect to those ambiguities that Your Honor referred to earlier. Mr. Joffe seems to think that something is not admissible unless somebody went into Chief Gallant's office and told him about it.

Other points in the February 19th order would lead one to look at whether the information was reasonably available to the City. We believe that there's a lot of information out there that is reasonably available to the City if they would only open their eyes.

And I think that question would

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certainly determine the scope of this trial and the admissible evidence. But, there again, the City also claims that it uses no job-related selection procedures. To what extent is their Consent Decree defense going to be mitigated by the fact that they are not using any job-related selection procedures—as I heard Chief Gallant's deposition two weeks ago, he is using pure quotas.

MR. ALEXANDER: Well, I would not characterize it that way. I would say this, that—it is no surprise I wouldn't characterize it that way. But Chief Gallant has altered his selection procedure in 1981 only to the extent that he now will pick from a supplemental board's certified list.

It is the chief's testimony that the system prior to 1981 did not always yield, in his opinion, the most qualified person for the position and that he is not doing an investigation now any different from the investigation in which he engaged prior to 1981.

And he has, and I think his

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deposition pretty clearly established that, relatively limited knowledge concerning candidates for promotion, both black and white. That has been the way it has been done in the Fire Department.

MR. JOFFE: I think the problem, Your Honor, is our case, the defendants' case I think is relatively simple. We are going to put people on the stand who are going to say they operated under the decree, they believed they had to fill so many positions, that if people were qualified, they were put into that number of positions.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

ORDER

Upon consideration during a status conference of the pending motions in this case, it is hereby ORDERED as follows:

(1) The United States' motion to realign in *B.A.C.E. v. Arrington*, CV 82-P-1852-S is GRANTED to the extent that the United States in good faith believes that actions of the City are discriminatory against the plaintiffs and are neither required nor permitted by the consent decree.

(2) The time within which the defendants must file an answer or responsive pleading to the complaint in intervention of the United States in *Zannis v. Arrington*, 83-P-2680-S is postponed until twenty (20) days following completion of the first trial in this case or such time as otherwise ordered by the court.

(3) The City's motion to quash the subpoenas duces tecum directed to Chiefs Gallant and Laughlin is MOOT.

(4) The City's motion for a protective order is GRANTED, subject to the City's indication during the conference that it is willing to produce a summary describing the general policies and procedures for promotion within the Police and Engineering Departments upon request.

(5) The Personnel Board's motion to amend its answers is GRANTED.

(6) The United States' motion to quash the subpoena duces tecum directed to Richard Ritter is GRANTED insofar as Mr. Ritter need not produce documents listed in Exhibit A to the United States' response to the *Martin*-Intervenors' Rule 34 Requests or internal governmental memoranda. Otherwise, the motion is DENIED.

(7) The United States' motion under Rule 26 to declare that its deposition not be had is GRANTED.

(8) The *Martin*-Intervenors' motion under Rule 37 to compel the production of documents is DENIED in view of the court's unwillingness to compel disclosure of documents listed in Exhibit A and internal governmental memoranda and the United States' agreement to produce documents listed in Exhibit B. Following the deposition of Mr. Ritter, production of these privileged materials will be considered upon a showing of need for specified documents.

(9) The *Martin*-Intervenors' motion under Rule 37 to compel further interrogatory answers from plaintiffs or to limit evidence is DENIED, subject to plaintiffs' disclosure by September 1, 1985, of witnesses and documents they anticipate using at trial, to be followed by similar disclosure from the defendants by September 25, 1985. Accompanying each anticipated witnesses' name there shall be a brief paragraph describing the anticipated testimony.

(10) A discovery cutoff of October 1, 1985, is established in this case.

This the 8th day of July, 1985.

/s/ Sam C. Pointer, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	
BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

[In re: Wilks, *et al.* v. Arrington, *et al.*]

MOTION TO INTERVENE AND COMPLAINT IN INTERVENTION OF CHARLES E. CARLIN

1. Charles E. Carlin moves the Court for leave to intervene as an additional party plaintiff.

2. Carlin is a white male Fire Lieutenant of the Birmingham Fire and Rescue Service who has been denied promotion in a manner similar to the original plaintiffs in that he was denied promotion to the classification of Fire Captain due to his race.

3. Upon the granting of this motion, Carlin adopts by reference all of the allegations of the original Complaint in *Wilks v. Arrington* by reference and prays for the same relief as requested therein for himself.

WHEREFORE, Carlin respectfully moves for leave to intervene as an additional party plaintiff and further requests that he be permitted to adopt the original Complaint as his Complaint in Intervention.

/s/ Raymond P. Fitzpatrick, Jr.
RAYMOND P. FITZPATRICK, JR.
Attorney for Proposed
Intervening Plaintiff
Charles E. Carlin

[Certificate of Service, dated July 10, 1985, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

ORDER

Charles Carlin's motion to intervene in *Wilks v. Arrington*, CV 83-P-2116-S is hereby GRANTED. Because the *Wilks* case will be involved in the first trial of these consolidated cases, defendants are directed to answer or respond to the complaint in intervention within the time required by law.

This the 9th day of August, 1985.

/s/ Sam C. Pointer, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S
ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-P-2116-S

ANSWER OF DEFENDANT JEFFERSON COUNTY PERSONNEL BOARD TO THE COMPLAINT IN INTERVENTION OF CHARLES E. CARLIN

Comes now one of the defendants, the Personnel Board of Jefferson County, Alabama (the "Board"), and answers the complaint in intervention of Charles E. Carlin as follows:

1. The Board adopts and realleges all the averments of its Answer to the original Complaint of Robert K. Wilks consisting of paragraphs 1 through 20 and adopts all of its previous Amendment to Answer thereto consisting of paragraphs 21 through 25 as if all 25 paragraphs were set forth in their entirety herein. Copies of both the Answer and Amendment to Answer are attached hereto.

/s/ David P. Whiteside, Jr.
David P. Whiteside, Jr.

/s/ Michael L. Hall
Michael L. Hall

Attorneys for the Personnel
Board of Jefferson County, Alabama

OF COUNSEL:

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(205) 322-0616

[Certificate of Service, dated August 22, 1985, and attachments omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S
ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S

ANSWER OF DEFENDANT-INTERVENORS TO THE COMPLAINT IN INTERVENTION OF CHARLES E. CARLIN

Defendant-intervenors John W. Martin, Major Florence, Ida McGruder, Sam Coar, Eugene Thomas and Charles Howard, individually and on behalf of all others similarly situated, for their answer to the Complaint in Intervention filed by Charles E. Carlin:

1. Adopt by reference paragraphs 1 through 12 of their Amended Answer to the original Complaint.

2. State that they are without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 2 of the Complaint in Intervention.

3. Adopt by reference the First, Second and Third Defenses of their Amended Answer to the original Complaint.

WHEREFORE, defendant-intervenors pray that plaintiff-intervenors take nothing by their suit, that judgment be entered for the defendants and that defendant-intervenors be awarded their costs of suit and reasonable attorneys' fees.

August 29, 1985

/s/ Thomas D. Barr
THOMAS D. BARR
ROBERT D. JOFFE
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Attorneys for Defendant-Intervenors

[Certificate of Service, dated August 29, 1985, omitted]

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

[Wilks v. Arrington; Civil Action No.: CV 83-P-2116-S]

ANSWER OF DEFENDANTS RICHARD ARRINGTON, JR. AND THE CITY OF BIRMINGHAM TO THE COMPLAINT IN INTERVENTION OF CHARLES E. CARLIN

For answer to the Complaint in Intervention, filed by Charles E. Carlin, allowed by order of August 12, 1985, these defendants say as follows:

FIRST-FIFTH DEFENSE

These defendants adopt by reference the affirmative defenses 1 through 5 of their original answer in *Wilks v. Arrington*.

SIXTH DEFENSE

To the extent this action is predicated upon a claim of racial discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, as amended, ("Title VII"), plaintiff has failed to satisfy the necessary statutory conditions precedent to suit. With respect to plaintiff's EEOC charge 042841005 filed by plaintiff on February 22, 1984 claiming he was discriminately denied a promotion to Fire Captain on September 10, 1983, plaintiff failed to file suit within 90 days of receipt of his right-to-sue letter. The EEOC issued plaintiff a notice of Right to Sue and Determination Letter on April 24, 1984, and plaintiff failed to file his Complaint in Intervention until July 12, 1985. Thus, to the extent plaintiff Carlin's complaint is based on acts encompassed in his February, 1984, EEOC charge, such claims are barred and may not be litigated.

With respect to plaintiff's second EEOC charge 042850912 which was filed on March 4, 1985, which claims plaintiff was "not promoted because a black was promoted on the basis of his race to Fire Captain", plaintiff failed to file a timely charge of discrimination within 180 days of the alleged discrimination as required by § 706(e) of Title VII. The only promotion of a black to the Fire Captain's position, the promotion on September 10, 1983, of Tony Jackson, occurred over 180 days prior to the filing of plaintiff's second EEOC charge. Thus, to the extent that plaintiff Carlin's complaint is based on acts not occurring within the 180-day period prior to the filing of his EEOC charge, such claims may not be litigated because they are time-barred.

SEVENTH DEFENSE

To the extent the Complaint in Intervention is predicated upon 42 U.S.C. § 1981 and 42 U.S.C. § 1983, plaintiff has failed to satisfy the necessary statutory conditions precedent to suit. Plaintiff's claims under 42 U.S.C. 1981 are time barred under the applicable one-year Alabama Statute of Limitation.

EIGHTH DEFENSE

To the extent plaintiff's complaint raises any issue other than his failure to be promoted to Fire Captain in September, 1984, such issues are not like or related to plaintiff's second charge of employment discrimination filed with the EEOC, EEOC charge No. 0428509212, and cannot be litigated in this action.

NINTH DEFENSE

Plaintiff's second EEOC charge, EEOC Charge No. 0428504212 which was filed March 4, 1985, raises no issues which were not addressed in his first EEOC charge, Charge No. 042841005 filed on February 24, 1984.

TENTH DEFENSE

Plaintiff lacks standing to bring any claim against these defendants.

ELEVENTH DEFENSE

For further answer to the Complaint in Intervention, these defendants say as follows:

1. Paragraph 1 does not require a response.

2. These defendants admit Carlin is a white male Fire Lieutenant of the Birmingham Fire and Rescue Service and admit that they consider race in promotion and employment decisions, to the extent required by the provisions of the consent decree heretofore entered in Civil Action Nos. 75-P-0666-F, 74-Z-12-S, and 74-Z-17-S. These defendants deny the remaining allegations of paragraph 2 of the Complaint in Intervention.

3. These defendants adopt the Sixth Defense of their original Answer in *Wilks* v. *Arrington* in specific response to paragraph 3 of the Complaint in Intervention.

4. Except as herein expressly admitted the allegations in the Complaint in Intervention are denied.

/s/ James K. Baker
James K. Baker

/s/ Eldridge D. Lacy
James P. Alexander
Robert K. Spotswood
Eldridge D. Lacy

Attorneys for Defendants
Richard Arrington, Jr., and
the City of Birmingham

OF COUNSEL:

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1400 Park Place Tower
Birmingham, AL 35203
Telephone (205) 252-4500

[Certificate of Service, dated August 29, 1985, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

MOTION OF THE UNITED STATES FOR PRE-TRIAL EVIDENTIARY RULING ON BURDENS OF PROOF

COMES NOW THE UNITED STATES OF AMERICA, Plaintiff-Intervenor herein, and files this Motion for a Pre-trial Evidentiary Ruling on the parties' respective burdens of proof at trial. This Motion is premised on the United States' ability in its case-in-chief to show that race was a significant factor in the promotional decisions at issue. Once this direct evidence of discrimination has been introduced, it is the position of the United States that the burden then shifts to the City to establish that its conduct was mandated by the decree, which requires a showing that the black promotees were not demonstrably less qualified than the white plaintiffs.

A Memorandum in support of this Motion is attached hereto and incorporated herein by reference.

WHEREFORE, the United States prays that its Motion be inquired into and granted. Moreover, because of the importance of this Motion to future discovery efforts and trial preparation, the United States requests this Court to set an expedited briefing and hearing schedule on this Motion.

Respectfully submitted,

WM. BRADFORD REYNOLDS
Assistant Attorney General

CHARLES J. COOPER
Deputy Assistant
Attorney General

FRANK W. DONALDSON
United States Attorney
Federal Courthouse
Birmingham, Alabama 35203

/s/ Mary E. Mann
MARY E. MANN
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[Certificate of Service, dated September 14, 1985, Memorandum and Attachments omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

BEFORE THE HONORABLE SAM POINTER
STATUS CONFERENCE
COMMENCING AT: 8:30 A.M.
ON THE 17TH DAY OF SEPTEMBER, 1985

* * *

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THE COURT: Let me respond there. I think the trial should be held in December, and it seems to me that I should allot a block of time to the plaintiffs and require that they

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identify — when we come back to the time — the time with the identification of those they reasonably anticipate calling during that period of time. I say that would presumably be the plaintiffs and the United States because there's kind of a joinder in that position.

In terms of the block of time, if I look at the paperwork that gets generated and amount of discovery, it would say we better set aside several weeks or months, and I just — I have a hard time imagining that that's really required in order to deal with the kind of issues that have to be dealt with here, and it seems to me that essentially about four days ought to be adequate for the plaintiffs to put on their case, plaintiffs and defendants put on their case, and that is on the basis that the cross-examination of any witness would be no greater than the amount of direct testimony as a rule of thumb in terms of simply planning on how you — what you want to use.

And it's hard for me to understand how it would actually take more time than that

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for the plaintiffs to put on their position. I'm not yet — I'm not comfortable with the concept of how much time the defense is going to need.

MR. ALEXANDER: The truth of the matter is, Your Honor, I suspect that the defense witnesses are going to be the same folks who are talking from their side in that we will have — I mean I don't anticipate our case as a two-hundred-person list. It's not. It's a very small group of people.

MR. FITZPATRICK: Your Honor, I think four days — and I don't think the Court is inviting me to differ with you.

THE COURT: No, I'm inviting you to differ.

Q. I think four days is a bit ambitious. This, as we view it, is essentially the trial of sixteen disparate treatment cases, and I would estimate that the average — I don't — Your Honor's experience in trying disparate treatment cases, I would say probably a day and a half to two days on average for a single case, and true

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we have the same decisionmakers here.

THE COURT: That's the reason why it doesn't take that long because you've got the same decisionmakers.

MR. FITZPATRICK: But we've got sixteen people, sixteen sets of qualifications, corresponding qualifications of the black promotees to consider. We do have a lot of deposition testimony which can be submitted, and I presume Your Honor is not going to want all of that read in open court, if we can just submit pages.

MS. MANN: Your Honor, the United States again is looking at this trial with — there's more questions for us. I guess the bottom line is that we need some guidance from the Court as to what the burden of the plaintiff is going to be. If,

for example, we win on our burden of proof motion, I think that the Court has allowed more than enough time for the plaintiffs to put on their case.

MR. ALEXANDER: If you win on that, I don't need to show up.

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(Laughter).

THE COURT: Well, I think the plaintiffs have the ultimate burden of persuasion.

MS. MANN: Well, Your Honor —

THE COURT: That doesn't help you, does it?

MR. FITZPATRICK: The City has the burden of proving their defense that's our —

MS. MANN: We certainly agree in terms of the ultimate burden of persuasion, but I think a real question we need addressed and we would like to have it addressed through the Court setting a briefing schedule and a time for a hearing on this motion is who is going to have the burden of proving either the plaintiffs were demonstrably better qualified or that the individuals who were promoted were not demonstrably less qualified. And, of course, it's our position that the burden is on the defendants to prove the latter, but in terms of how that burden works out will make a real difference as to how long it takes us to put on

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our case in chief.

MR. ALEXANDER: Your Honor, I think one problem with the United States' motion which I've only cursorily read is that it assumes consent decree construcion [sic] — it's predicate is consent decree construction which we believe to be disputed. I don't believe you can separate consent decree construction from the issues raised in their motions, and it may well be the motion for partial summary judgment may have to be decided at the same time.

THE COURT: I'm not sure I'm totally following you.

MR. ALEXANDER: Well, it seems to me that they treat section two or paragraph two of the consent decree as an operative limitation on the goals provisions. We don't think it's due to be so construed, and that colors, if you will, their burden and allocation of proof arguments which in effect are a great deal more than that.

MR. JOFFE: Your Honor, I don't think the Court can resolve the burden of proof without making the defendant rulings on the

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meaning of the decree which you've indicated you wanted to wait until either trial or summary judgment motion. My suggestion would be that we deal with it in a summary judgment motion. If the motion is unsuccessful, then, I don't disagree that these issues can be decided at the outset of trial, but I think with discovery still uncompleted we are just too far ahead to deal with that.

THE COURT: Well, I think essentially what I have attempted to do up to this point is to say until I knew what the facts were I preferred not to engage in sort of philosophy resolution of some matters on the burden of proof or on the construction of the decree because those might in fact on any particular case be irrelevant, and it's been more on that thesis that I have delayed making that kind of ruling until I saw that the ruling had to be made.

MS. MANN: Your Honor, we think that through the depositions that have been taken to date that we do have sufficient facts from which

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Your Honor could make a ruling on these questions. We've taken all of the plaintiffs' depositions. We've taken all of the affirmative promotees depositions. We've taken the heads of the departments. We've taken some of the supervisory personnel. We've taken — we're doing the Mayor right now. We've taken the head of the City office of personnel, and we believe

that the crucial depositions have been taken. It may be that Your Honor needs more information so that you can satisfy yourself.

THE COURT: Well, my sense is that that information is what I need to have, but I'm not sure that it's due to be presented on a summary judgment because I think that information that this — that there are going to be sufficient disputes at least in terms of the conclusions one would draw that would make summary judgment inappropriate, but it sounds like that's the kind of information that's due to be presented at a trial.

MR. FITZPATRICK: Your Honor, one further question remains is whether the decree

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is going to be construed from its four corners or whether the Court is going to consider parole evidence. I don't know if that's a question that can be resolved prior to trial or not, but that would certainly help us in culling our witness list.

THE COURT: I would say there is some ambiguity in the consent decree. And to — it may be that parole evidence, therefore, is going to be of some significance. On the other hand, there are certainly areas of the consent decree that are without ambiguity.

MS. MANN: Would the Court entertain a pretrial motion on that issue?

THE COURT: I'll entertain any motion.

(Laughter).

THE COURT: I don't have much choice I don't think. I'm just not sure how well it's going to be able to be addressed in advance. That's the difficulty.

* * *

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THE COURT: Well, I think the plaintiffs need to assume for purpose of the trial that the burden of proof is going to go against you. You have to prepare for trial on that basis.

MR. ANGUS: Well, if the burden for the plaintiff is to demonstrate that discrimination has occurred, what further burden does the plaintiff bear at that point?

THE COURT: Well, I think you also better be prepared to deal with the demonstrably better qualified issue and establish that blacks were promoted when there were demonstrably better qualified whites there on the list that the decision makers knew to be demonstrably better qualified.

MR. ANGUS: Your Honor, have you addressed or read at all the brief we filed yesterday concerning the pretrial evidentiary ruling or burden of proof?

THE COURT: No.

MR. ANGUS: I think this case really calls for some unique decisions in the areas of

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burden of proof. I mean traditionally you've got the McDonnell-Douglas standard, and you've got the standard where prima facie is not needed where you can show overt discrimination. There are shifting burdens of production and persuasion. If the United States is to bear the burden in this case of showing not only that a racial decision was made in an individual case but also that we bear the burden of showing a demonstrably better or less qualified person, I think that's a unique — unique approach for a burden for a plaintiff in a Title 7 case.

What makes this case unique is the assertion of an affirmative defense of the consent decree by the defendants. And I — in our view, the motion we filed yesterday could have a significant bearing on what presentation of burden of proof is made by the United States.

THE COURT: It may. I haven't looked at it. I'm just saying in terms of preparing for trial I think you have to prepare for trial on the basis that the issue there can go against you.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	CIVIL ACTION NO.
BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CV 84-P-0903-S

CAPTION

THE ABOVE-STYLED CAUSE came on to be heard before the Honorable Sam C. Pointer, Jr., in his Chambers, at the Federal Courthouse, Birmingham, Alabama, commencing at 5:00 P.M. on the 31st day of October, 1985.

* * *

[Page 5]

I'll take first the last item, this matter of the motion for ruling on the pretrial

[Page 6]

evidentiary burden. I have indicated already, and I simply continue to stick by that, that the United States and the plaintiffs should anticipate that they will have the burden at least of going forward with the evidence with respect to establishing that the plaintiffs were demonstrably better qualified than the person selected by a job procedure, by a validated job procedure. And not only that but to try to demonstrate that the City had knowledge of such a difference.

I recognize the problem that remains about whether if they didn't have it it was immediately at hand and they closed their eyes to it, and I sort of left that open. But I think that's the position that the plaintiffs and the United States should take.

MR. ANGUS: Judge —

MS. MANN: Judge — at least we speak with one voice. Last time we were before the Court Your Honor indicated that you had not had an opportunity to review our motion, and in fact it had been filed merely the day before the

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hearing. Are we to take your statements today as a ruling on the motion, or is this just your preliminary —

THE COURT: No, I'm saying I'm not going to make a ruling on the motion in terms of actually making a decision that would in effect constitute the decision of the Court as to where the burden of proof is. I'm saying that the plaintiffs and the United States need to proceed on the basis of that, and I'll continue to be looking for case law up until the time of a decision having to be made, and we may get some case law guidance, who knows, before then that's better than what it is now.

But until something else happens, you have to work on the basis that that is going to be your burden.

MR. ANGUS: Your Honor, James Angus with the Department of Justice. May I ask a question, are you saying that after reading our brief you haven't been persuaded by any legal authority we've set forth that the motion for a pretrial evidentiary ruling is well taken at

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this time or is supported in law?

THE COURT: I'm saying that I think there is a good debate on what the rule of law is, and I don't think the law is clear one way or the other, and I think that we may get some further guidance by the time of a decision, but that subject to that occurring, the plaintiffs and the United States need to proceed on the basis that that's what the Court is going to be looking for you to do.

MR. ANGUS: I guess the Court is saying then we would expect a ruling of that before a decision on the merits but not before the proceeding with the presentation of evidence at the trial?

THE COURT: That's correct. In limine motions can be useful obviously, but particularly in areas in which it's not clear what the law is and where the law may change, I think it's inappropriate to try to give any further guidance other than what I've done which is a preliminary guidance that goes against you such that you should proceed on the basis,

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prepare your case on the basis that you are going to have that burden.

MR. ANGUS: So the burden we should proceed on is demonstrably better qualified in accordance with job related selection procedures?

THE COURT: That's right. With a related or subissue as to whether the defendants or the City officials had that information or perhaps had it reasonably available to it which is what I outlined, I guess was back in February.

* * *

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THE COURT: Well, I think there is at least a fair shot in this case that after the plaintiff and United States put on their evidence there is going to be a judgment under Rule 41. If the law continues to be as I viewed it to be as of approximately February of this year, I don't know what plaintiffs and United States can come forward with, but I wouldn't be surprised if that is the situation, that the plaintiffs and United States simply can't win on that kind of standard. Now, if that be true, then I'm just — I'm concerned about this expansion or continued expansion even though it's responsive to their witness list.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

MOTION IN LIMINE OF UNITED STATES TO EXCLUDE CERTAIN TESTIMONY AND EXHIBITS LISTED IN DEFENDANTS' JOINT LIST OF TRIAL EXHIBITS AND WITNESSES

On November 18, 1985, defendant-intervenors, the City of Birmingham, and Richard Arrington, Jr. served on the United States and private plaintiffs a "Joint List of Trial Exhibits and Witnesses." This voluminous list reveals that defendants intend to present at trial a large amount of evidence that should be deemed inadmissible by the Court. The objectionable evidence falls into two categories: (1) evidence intended to establish a "History of Discrimination" in the City of Birmingham; and (2) evidence extrinsic to the City Consent Decree, intended to ascribe to the Decree a meaning that goes beyond the plain language of its four corners.

Evidence of historical discrimination is not at all probative of the issues that are essential to a determination of this action and will only serve to unnecessarily prolong the trial process. Pursuant to Rules 401 and 402 of the Federal Rules of Evidence or, in the alternative, Rule 403, such evidence should be excluded. Evidence that is extrinsic to the Decree and intended to support an interpretation that is contrary to the express language of the Decree is also inadmissible based upon firmly established rules regarding construction of consent decrees.

In the interest of clarifying the issues for trial and expediting the trial process, the United States seeks pre-trial rulings

on these evidentiary matters. The grounds for this Motion and the specific evidence sought to be excluded are set forth in the accompanying supporting Memorandum.

WHEREFORE, the United States prays that the Court grant its Motion in Limine seeking a Pre-Trial Ruling that the exhibits and testimony listed in the Memorandum attached to this Motion be excluded from the trial of this case.

Respectfully submitted,

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/s/ Mary E. Mann
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[Certificate of Service, dated December 3, 1985, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

STATUS CONFERENCE
BEFORE THE HONORABLE SAM POINTER
COMMENCING AT 4:46 P.M.
ON THE 5TH DAY OF DECEMBER, 1985

* * *

[Page 5]

There's a motion by the United States, a motion in limine to exclude certain testimony and exhibits that the defendants have listed. This is in two categories. One would be evidence relating to a pattern of racial discrimination in the City, and evidence extrinsic to the decree bearing upon the interpretation or meaning of the decree.

Insofar as the matter of restricting evidence on pattern of racial discrimination, I will deny the motion to exclude, but I assume that through the discovery devices that have already been gone through that will be presented for the most part simply on the basis of some stipulations that have already been dealt with,

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that a — a lot of that I believe has been covered in that area, and I certainly don't anticipate any prolonged new or live evidence, so to speak, dealing with that subject matter. I can understand that it may be of some significance at a time, particularly an appellate court reviewing the matter to be aware of that evidence.

* * *

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Now, there's a motion by the plaintiffs to deem things admitted. We've gone through this once before.

MR. FITZPATRICK: Your Honor, we are more or less in the same position we were after we got the first set of responses where they didn't admit, deny or object, but they told me all about the consent decree, and —

THE COURT: I'm going to treat it that they have acknowledged that race was a factor and was significant in the sense that or subject to the limitation that, they believed that they were operating — that they were bound by the consent decree to take race into

[Page 14]

consideration in those areas in which there was underrepresentation, and in fact they did so.

MR. FITZPATRICK: Your Honor, what I'm concerned about is the fact that in — in using preferences, racial preferences that race significantly impacted in the final decision.

THE COURT: I think I've told you —

MR. FITZPATRICK: Okay.

THE COURT: — what they've admitted, and they have admitted it in the context of taking it into account certainly as a significant factor in those areas in which there was underrepresentation, believing that they were bound to consider it in that light and were — had certain obligations under the consent decree.

N what you're really talking about is a legal theory. They are admitting the fact. What both sides are arguing about is the legal theory. Does that mean that race was a motivating factor, or does it mean that the consent decree was the motivating factor? That's what you are really arguing about. They are admitting the underlying objective fact.

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They are declining to admit the — what they perceive to be your intent and your [sic] acknowledging this by saying, no, I want you to say just flat-out it was race.

MR. FITZPATRICK: They did it.

THE COURT: And I think they've done what you can fairly ask them to do, and they are bound in the way in which I've described it to have admitted that. So I'm going to deny any further — or refuse to grant any further order in this way. They are bound to have admitted what they've admitted, and it has the impact as far as I'm concerned of admitting that race was taken into account, was a significant factor in the context of this — of doing it by virtue of what they believed the decree calls for.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

CAPTION

THE ABOVE-ENTITLED CAUSE came on to be heard before the Hon. Sam C. Pointer, Judge, at the United States District Courthouse, Birmingham, Alabama, on the 16th day of December, 1985, commencing at 9:08 a.m., when the following proceedings were had and done.

* * *

[Page 3]

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[Page 4]

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[Page 5]

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* * *

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MR. ANGUS: Your Honor, that brings us to where this started with Mr. Whiteside. Government — Plaintiff's Exhibit Number 23 is the stipulations that have been entered into among the parties, and it covers a variety of areas. By entering into this stipulation, the United States for purposes of — or to the extent that this document reflects historical data is not admitting relevancy of such data.

Also attached to those stipulations are the examination scores, score sheets of the Personnel Board as well as the roster of eligibles as a result of each of the exams, and we would, again, reassert the relevancy of test scores to this proceeding and ask the Court to admit those into evidence.

MR. ALEXANDER: Your Honor, by stipulating — by agreeing to the stipulation, we certainly do not concede the relevancy of the test stores [sic] and reserve our right to object to those.

THE COURT: All right. I think I

[Page 26]

understand Exhibit 23, the parties are agreeing that certain facts are true, however, the United States, for example, does not agree that certain historical data would be relevant. The City does not agree that certain matters relating to test scores, for example, would be relevant, but the parties are saying the facts themselves are true.

MR. ANGUS: That's correct.

MR. JOFFE: Your Honor, we join in the City's objection and also note that our objection extends to the rank number which appears in the material.

THE COURT: I understand that.

MR. FITZPATRICK: Plaintiffs join the United States' offer.

MR. ANGUS: Your Honor, we're — my understanding from appearances in chambers with respect to burdens of proof in this case is that the Court had indicated the government would have to show that the City had actual knowledge of test scores before that information would be admissible or considered by the Court. We would just note on the record our objection to that burden and assert that a plaintiff in a Title 7

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case generally enjoys a very wide latitude in some of the evidence it can present to the Court for purposes of proving a prima facie case of discrimination, but holding us to a burden of showing actual knowledge is a burden that we believe is unique in Title 7.

THE COURT: I understand the nature of the argument.

* * *

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MS. MANN: Your Honor, the next exhibit the United States would move into evidence is Exhibit Number 41 which is the City consent decree in U. S. Versus Jefferson County.

MR. FITZPATRICK: Your Honor, it's no secret that the plaintiffs would take the position that they are not bound by the City decree and that the decree does not affect our rights and by — by the admission of this, we don't want to be construed as waiving that position.

THE COURT: You certainly are not waiving it.

* * *

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Q. Prior to the consent decree being entered in 1981, how were promotions made in the fire department, say, to lieutenant?

A. They were made on the basis of promotional examinations.

Q. Based on the rank order?

A. Yes, sir.

Q. Just the rank order?

A. As far as I know.

Q. And after the entry of the consent decree, how did that change?

A. After the entry of the consent decree, the promotions were made, it's my understanding, on the basis of the consent decree's quotas or goals that were agreed to by the City and the

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Justice Department.

Q. Were the rank orders still used but separate for blacks and for whites?

A. That is my understanding.

Q. Do you know of any instance where the rank order wasn't followed?

A. I personally don't know, sir.

Q. Prior to the entry of the consent decree, was it necessary to have an eighty-five on the performance evaluation before you could take the test?

A. Prior to the time that we quit filling out the performance or the potential performance evaluation reports for promotion, the promotion part of the performance evaluation, it's my understanding that those required an average of an eighty-five on the evaluation.

Q. Before you were eligible to take the test?

A. Yes, sir. It has been done a lot of different ways in the past, but that was — at one time, that was used.

Q. And who gave the scores, the performance evaluations?

A. Other officers.

* * *

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Q. You said you would like to know in addition to how a person ranked on the test his number of years of seniority, and that the practice that you were aware of was that the Personnel Board gave one point for every year of seniority; is that correct?

A. That's my understanding.

Q. Do you know why one year equates with

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one point?

A. I have no idea.

* * *

[Page 126]

ROBERT C. WOOD,

being first duly sworn, was examined and

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testified as follows:

* * *

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Q. Would you describe the job duties and responsibilities of a lead worker?

A. Well, the lead worker is usually a senior person on the shift at the station, and as a general rule, lead worker follows seniority strictly throughout the entire station.

In other words, a person could be a — the third person or fourth person out on a

[Page 149]

certain station as far as seniority at that station, and an oldest person at the top either retire or get promoted or something like that and that person, regardless of whether he is already working on a shift with another lead worker, would assume that next position and move to another shift or something like this. This is a general way we have been doing this.

This is pretty much at the discretion of the captain at the station as to who is selected as lead worker, but it does carry a pay incentive of five percent.

But the purpose of the lead worker to begin with was to have all drivers or engineers that operate the apparatus lead workers so that they would obtain this little pay incentive because they would fill in in the absence of the ranking officer on the shift, whether it be the lieutenant or the captain on that particular apparatus. So they do assume that duty. They are the acting officer in the absence of the officer in charge.

* * *

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Q. Do you know who the first black to receive a paramedic license was?

A. In the City of Birmingham?

Q. In the City of Birmingham Fire and Rescue Service?

A. I would have to say James Lester, I believe.

Q. Do you know when that was?

A. I had James in some classes over there. It had to be in the late '70's somewhere. I can't remember the exact time frame.

* * *

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Q. Do you have any judgment as to how many black lead workers there are currently throughout the department?

A. I know there's one at Number 6 because I set him up lead worker, but that is Leslie Garner. Probably be the only one that I can speak for with any validity at this time. I am not that really sure about the other areas.

Q. When did you set up Leslie Garner as lead worker?

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A. Right before I was promoted to chief when I was captain at Number 6.

Q. This would have been sometime in 1984?

A. Oh, no. It might have been '83.

Q. '83?

A. Previous to that, yes.

Q. You testified that paramedics on a rescue unit are lead workers in a sense. Would you distinguish between a paramedic lead worker and an engine company lead worker as far as the type of work and responsibilities that each has?

A. The engine lead worker takes over the job of managing that fire company on all the calls that they respond to and the same thing essentially happens on a rescue unit.

The problem with a rescue unit is that they probably would run with more than one engine company and a larger number of personnel be involved. And generally when the rescue unit runs on the advanced life support calls, they would more or less — their evaluation of the situation would probably carry a good bit of weight as to how the situation was handled overall.

This would be one area where the

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medic lead worker on the rescue unit would have a lot of influence on the situation on probably the engine personnel as well as anybody else. But if you turn the tables around and the rescue unit was running with the engine company and there was a fire, then they would fall or become subject to the lead worker on the engine would be the person taking the command.

Q. Do you have a judgment based on your experience as to whether being a paramedic is more or less valuable in terms of being qualified for a lieutenant than being a lead worker on an engine?

A. I think they are parative. I think being a medic is very valuable in all aspects of it. I think being a lead worker is very valuable and I would look at them both as being very important factors in this.

* * *

[Page 180]

Q. . . . I think you said in response to a question by Ms. Mann that there was no strict seniority requirement to become a paramedic. Does seniority, however, play a role in that determination?

A. As far as who gets the training?

Q. Yes.

A. Not necessarily, no, sir.

Q. What is the average seniority in your

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view for the people that go into paramedic training?

A. Over the last few classes that I had any contact with at all, there have generally been younger personnel, four to six, eight years of service.

* * *

[Page 183]

Q. At the time you joined the Birmingham fire department in 1960, were there any blacks in the fire department?

[Page 184]

A. No, sir, I don't believe so.

Q. Do you have any knowledge of there being any black fire fighters in the Birmingham fire department prior to your joining?

A. No, sir. I don't have any knowledge.

MR. FITZPATRICK: Your Honor, may I have a continuing objection to relevance about these statistical matters?

THE COURT: All right. I overrule.

* * *

[Page 185]

LAWRENCE A. SMITH,

being first duly sworn, was examined and testified as follows:

* * *

[Page 205]

Q. Based on your experience, Captain, with the department and with drills and training, do you have an opinion as to whether the drivers test measureds [sic] job-related skills, knowledge and the abilities of fire fighters?

* * *

[Page 220]

Q. . . . I think you testified that Leslie Garner was the first black. And it was not clear to me whether you meant he was the first black to pass the drivers test or the first black hired by the fire department?

A. That is correct in both instances.

Q. That is, in the period from 1941 until he was hired in 1968, there were no other blacks?

A. I do not recall of any, sir.

* * *

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Q. (BY MR. FITZPATRICK:) Captain, is the fire lieutenant expected to instruct his personnel on the use of the apparatus?

A. Yes, sir.

Q. Is the information which is tested in the drivers test knowledge which is useful to the fire lieutenant in performing his duties?

A. Yes.

* * *

[Page 244]

FLOYD E. CLICK,

being first duly sworn, was examined and testified as follows:

* * *

[Page 245]

Q. When did you begin your employment with the Birmingham Fire and Rescue Service?

A. November the 25th, 1968.

Q. And from November 25th, 1968 until the present time, is your seniority uninterrupted?

A. That is correct, sir.

* * *

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Q. During the time that you were the acting officer at the station, would you describe what responsibilities were yours as the acting officer?

A. Well, sir, I had to see that the shift ran smoothly. I had to see that the men did their work and did it properly. I had to

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fill out all the reports that were necessary, had to make all the decisions that the officer would make had he been there.

Q. Could you tell me between the time you became a lead worker and May of 1982 approximately how many shifts did you serve as acting officer at Station 18?

A. At least a hundred and fifty, sir.

* * *

[Page 268]

JAMES DOUGLAS MORGAN,

being first duly sworn, was examined and testified as follows:

* * *

[Page 269]

Q. When did you begin working with the Birmingham Fire Department?

A. November the 25th, 1968.

Q. And have you been continuously employed with the fire department since 1968?

A. Yes, I have.

* * *

[Page 271]

Q. Apart from any in-service training that you may have received with the Birmingham Fire Department, have you taken any courses or pursued any education in fire science or fire related matters?

A. I have a fire science degree.

Q. Where did you get that degree?

A. From Jefferson State College.

Q. And what type of degree is that?

A. It's an applied science degree in fire science.

Q. And when did you receive that degree?

A. In 1973.

Q. Do you recall what your grade point average was?

A. 3.64.

Q. Is that on a four-point system?

A. On a four-point system.

[Page 272]

Q. When you received this degree from Jeff State, did you receive any sort of pay increase from the fire department?

A. I received a five percent educational increase.

Q. Do you recall who your instructors were in the fire science program at Jefferson State?

A. They were Battalion Chiefs with the fire department and Captains that were assigned to drilis and training.

* * *

[Page 282]

Q. Have you ever taken a competitive examination for the position of Fire Lieutenant in the Birmingham Fire Department?

A. Yes, I have.

Q. On how many occasions have you taken the Fire Lieutenants examination?

A. I've taken it every time since I was able to take it in 1974.

* * *

[Page 307]

GENE E. NORTHINGTON,

being first duly sworn, was examined and testified as follows:

* * *

[Page 309]

Q. When did you beginning [sic] working with the Fire and Rescue Service?

A. November 25th, 1968.

Q. Have you worked for the service continuously since that date?

A. Yes, sir, I have.

* * *

[Page 340]

JOEL [ALAN] DAY,

being first duly sworn, was examined and testified as follows:

* * *

[Page 341]

Q. When did you begin working with the Birmingham Fire Department?

A. A long time ago. November the 27th, 1961.

Q. Since November '61, has your seniority with the department been uninterrupted?

A. Continuous and uninterrupted for twenty-four years.

* * *

[Page 346]

Q. Have you ever taken a competitive examination for the position of lieutenant?

A. Yes. In 1980 and in 1982.

* * *

[Page 359]

VINCENT JOSEPH VELLA,

being first duly sworn, was examined and testified as follows:

* * *

[Page 360]

Q. And are you currently employed, sir?

A. Yes, ma'am. I'm employed at the Birmingham Fire and Rescue Service.

Q. When did you begin working for the fire department?

A. On February the 26th, 1968.

Q. Have you been continuously employed with the fire department since that date?

A. Yes, I have.

* * *

[Page 398]

LANE L. DENARD,

being first duly sworn, was examined and testified as follows:

* * *

[Page 399]

Q. When did you begin working with the fire and rescue service?

A. February 2, 1971.

Q. Have you worked continuously with the fire department since that date?

A. Yes.

* * *

[Page 423]

Q. And you have subsequently been promoted to Lieutenant, have you not?

A. Yes.

* * *

[Page 425]

ROBERT K. WILKS,

being first duly sworn, was examined and testified as follows:

* * *

[Page 426]

Q. When did you begin working with the Birmingham Fire and Rescue Service?

A. February the 26th, 1968.

Q. Is that an uninterrupted seniority date?

A. Yes, it is.

* * *

[Page 433]

Q. And as of April 1982, had you ever served as an acting officer?

A. Yes, I have.

Q. On about how many occasions have you served as an acting officer as of that time?

A. Approximately a hundred and fifty shifts.

* * *

[Page 435]

Q. Have you ever taken the competitive examination for the position of Fire Lieutenant?

A. Yes, I have.

Q. Have you taken it the last three times it was given?

A. Yes, I did.

Q. And did you take it on earlier occasions as well?

A. Yes, sir.

Q. Did you pass each of the last three tests that you took?

A. Yes, sir, I did.

Q. After the 1982 exam, were you informed of your rank on that exam?

A. Yes, I was.

Q. And what was your rank on the '82 register?

A. 8th.

Q. Did you take the '83 test?

A. Yes, I did.

Q. What was your rank on the register?

A. Third.

Q. Did you take the '84 test?

A. Yes, I did.

[Page 436]

Q. And what was your rank on the '84 register?

A. Nine.

Q. Is that the list that's currently in effect?

A. Yes, it is.

* * *

[Page 437]

Q. Okay. Was the first one after the 1982 exam?

A. Yes, it was.

Q. Who was present at that interview?

A. Chief Gallant and Chief Laughlin.

Q. Would you tell us, please, in your own words what happened on that occasion?

A. He stated that he had no objections of me being a Lieutenant, that he though I would make a good Lieutenant, but under the circumstances that he would have to promote blacks according to the consent decree.

Q. Did he ask you any questions on that

[Page 438]

occasion about your past experience with the fire service?

A. No, he didn't.

Q. On any subsequent occasion during the pendency of the 1982 list, were you interviewed? During the '82 list?

A. During the '82 list?

Q. Were you ever called back?

A. No, sir.

Q. After the 1983 test, were you ever interviewed?

A. Yes, I was.

Q. On how many occasions?

A. On one.

Q. Okay. And what happened on — on that occasion?

A. It was basically like the first interview. He stated that he had no objections to myself being a Lieutenant, that he didn't know how — there was five openings at the time and

didn't know exactly how they was going to have to promote them.

Q. You were third on the list?

A. I was third on the list.

Q. And did he indicate how many whites

[Page 439]

or how many blacks he thought he was going to promote?

A. He said he didn't know whether he had to promote three and two or four and one, in which order he was expected to promote them.

Q. And ultimately he promoted three blacks and two whites?

A. Yes, sir.

Q. Did you ask him any questions about whether you could expect to be promoted off of that list?

A. On another occasion, we was at Station 1 for an insurance seminar, and I saw him in his coffee room there. And I just stuck my head in the door and I asked him that I understood that he had made the request for four more lieutenants, and he said, yes, but he didn't know if he was going to get them or not.

Q. Now, this was during the pendency of the 1983 register?

A. Yes, sir.

Q. And he indicated to you that he had requested four more lieutenants' positions to be filled?

A. That is correct.

[Page 440]

Q. Do you know if there were in fact vacancies at that time?

A. Yes, sir, there was.

* * *

[Page 440]

Q. Now, I believe you testified that you are ninth on the current register, the '80 — after the 1984 test?

A. I came out ninth on that list, yes, sir.

[Page 441]

Q. Okay. Have you been interviewed as a result of your position — your results on that examination?

A. No, I have not.

* * *

[Page 442]

Q. Mr. Wilks, as I understand it, you were number eight on the 1982 register?

A. Yes, sir.

Q. And there were — were there 12 promotions made during the pendency of that register?

A. Yes, sir, there was.

Q. Were you the highest ranking eligible who was not promoted from that list?

A. Yes, sir.

Q. And I — the 1983 test you were third

[Page 443]

on the register?

A. That is correct.

Q. And there were five slots filled during the promotion — during the pendency of that list?

A. Yes, sir.

Q. And again you were the highest person — the ranking eligible who was highest on the list who was not promoted?

A. That is correct.

Q. And during the 1984 list that is now in effect you are number nine. How many promotions have been made from that list?

A. Ten, I believe. I think it's eleven. Ten.

Q. Ten or eleven?

A. Ten.

Q. Okay. And you have not been interviewed as of this time?

A. No, sir.

Q. And also in 1980 — during the pendency of the '83 list, Chief Gallant told you that they had open positions?

A. Yes, sir.

Q. And those were not filled during the

* * *

[Page 444]

pendency of the list?

A. No, sir, they were not.

* * *

[Page 452]

Q. Are you a member of the Birmingham Association of Fire Fighters, Local 117?

A. Yes, I am.

* * *

[Page 462]

RONNIE J. CHAMBERS,

being first duly sworn, was examined and testified as follows:

* * *

[Page 463]

Q. When were you hired by the fire service?

A. February the 23rd, 1970.

Q. Is that an uninterrupted seniority date?

A. Yes, it is.

* * *

[Page 476]

CARLOS E. PAYNE,

being first duly sworn, was examined and testified as follows:

* * *

[Page 476]

Q. What is your present classification?

A. Lieutenant.

Q. When were you promoted to lieutenant?

A. August of '83.

Q. When did you begin working for the

* * *

[Page 477]

fire department?

A. June of 1960.

Q. Is that an uninterrupted seniority date?

A. Well, seniority, yes, sir — well, no, not exactly.

Q. Okay.

A. I quit in '66.

Q. About — for less than a year?

A. Yeah. It was back — be less than a year.

* * *

[Page 484]

Q. (BY MR. JOFFE:) How much time

[Page 485]

elapsed between when you were certified and thought you were going to be promoted and when you were actually promoted?

A. I think about a month.

Q. I'm sorry. Maybe you didn't understand the question. Between when you were certified after the first test.

A. '82 and '83?

Q. Yes. How much time —

* * *

[Page 485]

A. To my knowledge in '82 I wasn't certified.

Q. (BY MR. JOFFE:) When did you take the test?

A. In '82?

Q. Yes.

A. January, I think, sir.

Q. And when you were passed over the first time when you ranked number ten, that was in '82?

A. Yes, sir.

Q. And when you finally got your promotion in '83, how much time had elapsed?

[Page 486]

A. From the time I taken the second test or —

Q. No. From the time you — the first set of promotions were made until the time you were promoted.

A. Well, from — I don't know when the grades came out in '82, March, I think, probably from March of '82 until August of '83.

* * *

[Page 486]

WOODROW LAST[illegible]R,

being first duly sworn, was examined and testified as follows:

* * *

[Page 493]

Q. (BY MR. JOFFE:) For the record, would you state your race?

A. Black.

* * *

[Page 495]

Q. Did you ever apply to be a fire fighter in Birmingham in the 1960's before your military service?

A. No, sir.

Q. Why didn't you?

A. It wasn't the thing to do.

Q. Why was that?

A. Hostilities.

Q. Could you describe what hostility you are talking about?

[Page 496]

A. Prior treatment by the fire department during the 1960's, demonstrations.

Q. Of blacks?

A. Right.

* * *

[Page 529]

JAMES E. LASTER,

being first duly sworn, was examined and testified as follows:

* * *

[Page 530]

Q. What is your race for the record, please, sir?

A. I am black.

Q. And who is your current employer?

A. City of Birmingham.

Q. Are you employed by the fire service?

A. Yes, I am.

Q. When did you begin working for the Birmingham Fire and Rescue Service?

A. 1974.

Q. Was it January 21, 1974?

A. Yes, it was.

Q. Did you take the promotional examination for fire lieutenant in January of 1982?

A. Yes, I did.

* * *

[Page 550]

Q. Lieutenant, have you lived in Birmingham all of your life?

[Page 551]

A. Yes, I have.

Q. You lived in Birmingham during the 1960's?

A. Yes, I did.

Q. Lieutenant, did you apply for the Birmingham Fire Service during the 1960's?

A. No, I did not.

Q. Did you have any friends of yours who were black that applied to the Birmingham Fire Service in 1960?

A. Not to my knowledge, none.

* * *

[Page 551]

Q. Lieutenant, was it common knowledge among the black community in the 1960's that the City of Birmingham discouraged blacks from

[Page 552]

applying to the Birmingham Fire and Rescue Service?

A. Best of my knowledge, yes.

Q. And what is that based on?

A. Historical procedures.

* * *

[Page 553]

Q. And how long were you in the Marine Corps?

A. Three years.

Q. Did you receive an honorable discharge?

A. Yes, I did.

Q. And when were you discharged?

A. 1969.

* * *

[Page 603]

ROBERT BRUCE MILLSAP,

being first duly sworn, was examined and testified as follows:

* * *

[Page 604]

Q. When did you begin working for the fire and rescue service?

A. On December of 1976.

Q. Is that an uninterrupted seniority date?

A. Yes, it is.

* * *

[Page 619]

Q. (BY MR. ALEXANDER:) Mr. Millsap, you are a station steward at Station 25 with the BFA, is that correct?

A. That is correct.

* * *

[Page 620]

Q. There would have been times when you would have communicated with others of your colleagues in the union for purposes of verifying test scores on a particular exam?

A. Yes, just about all the fire department members are members of the union, yes.

* * *

[Page 631]

Q. Is there any reason why you would be ineligible or unable to sit for the exam when it's next given?

A. I could foresee no reason.

* * *

[Page 632]

Q. I think on your direct examination you said that just about all fire department members are members of the union, is that correct?

A. That would be correct, yes.

Q. Is that true of black members as well?

A. No, it is not.

Q. When was the 1980 —

A. When you talk — excuse me. Are you talking about all black members of the department?

Q. I wasn't talking about anything. I was asking whether when you made the statement just about all fire department members are m nbers of the union you were thinking only of whites or whether you were thinking of blacks and whites?

A. I was thinkin about all members of

[Page 633]

the department. Did you not ask if it was true of blacks, also?

Q. On direct examination, did you not say that just about all fire department members are members of the union?

A. Yes, I did.

Q. Is that true of blacks as well?

A. I wouldn't know if it's true of all blacks in the department.

* * *

[Page 633]

Q. Mr. Millsap, my question to you was whether when you made the statement just about all fire department members are members of the union that question or that answer — that

statement was true of all members of the fire department or just the whites?

A. All members of the fire department, yes.

Q. But it is not true of blacks, is it, that just about all the black members of the fire department are members of the union?

[Page 634]

A. I don't know. I don't know the answer to that.

Q. Well, if you don't know the answer to that, how could you make the statement with respect to just about all members of the fire department?

A. I've known — I know that at one time just about all members of the fire department were members of the Fire Fighters' Association. I know that in the past some blacks have gotten out of the organization. I don't know the exact number.

* * *

[Page 642]

JOHN E. GARVICH,

being first duly sworn, was examined and testified as follows:

* * *

[Page 643]

Q. And how long have you been employed with the fire department?

A. Since '70 — January 1974.

Q. And have you served continuously with the fire department since that date?

A. Yes, I have.

* * *

[Page 691]

JACK FREEMAN,

being first duly sworn, was examined and testified as follows:

* * *

[Page 691]

DIRECT EXAMINATION

* * *

[Page 695]

Q. Did there come a time when you were promoted to the position of fire lieutenant?

A. Yes, sir.

Q. What was that? Do you recall the date?

A. May the 27th, 1985, I was promoted to lieutenant and assigned to Station 13.

* * *

[Page 729]

JAMES W. HENSON,

being first duly sworn, was examined and testified as follows:

* * *

[Page 729]

Q. When did you begin working with the fire service?

[Page 730]

A. On October 20th, 1976.

Q. Is that an uninterrupted seniority date, sir?

A. Yes, sir.

* * *

[Page 837]

ALVIN BERNARD VON HAGEL,

being first duly sworn, was examined and testified as follows:

* * *

[Page 837]

Q. When did you begin working with the

[Page 838]

fire department?

A. February 12, 1968.

Q. Is that an uninterrupted seniority date?

A. Yes, sir, it is.

* * *

[Page 961]

CHARLES E. CARLIN,

being first duly sworn, was examined and testified as follows:

* * *

[Page 962]

Q. When did you begin working for the fire department?

A. January the 6th, 1964.

Q. Is that an uninterrupted seniority date?

A. That's correct.

* * *

[Page 982]

HOWARD POPE,

having been first duly sworn, was examined and testified as follows:

* * *

[Page 983]

Q. When did you begin working with the Fire and Rescue Service?

A. December 26th, 1958.

Q. Is that an uninterrupted seniority date?

A. Yes, it is.

* * *

[Page 994]

Q. . . . You stated that you were hired by the city in December of 1958?

A. That's correct.

Q. And prior to your being hired, did you take an examination administered by the Jefferson County Personnel Board?

A. Yes.

Q. And how many people approximately took that examination?

A. I am not certain. There were probably a hundred and fifty in the group that I took. And I understood they were giving a second test that afternoon. I am not sure.

Q. Were there any blacks tested at the time that you took the examination?

A. None that I can recall.

Q. Do you have any idea why there were no blacks taking that examination at that time?

A. No, I don't.

Q. You have in front of you a document marked for identification as Defendant's Exhibit Number 1984. That document purports to be an announcement for an examination for fire fighter. Have you ever seen that document before?

[Page 995]

A. No, I haven't.

Q. Did you see an examination — did you see an examination announcement at the time that you took a fire fighter test?

A. No.

Q. You don't recall seeing any piece of paper pertaining to the test at the time that you showed up to take the examination?

A. No.

MR. DEVANEY: Objection, Your Honor. It is beyond the scope.

THE COURT: Overruled.

Q. (BY MR. SPOTSWOOD:) I call your attention to the fact that under entrance requirements, there is stated applicants must be white male and meet the qualifications prescribed below. Did you ever see such a piece of paper at the time that you took the examination or prior to the time that you took the board examination for fire fighter which restricted the applicants to white males?

MR. FITZPATRICK: Your Honor, I am going to object to questioning him from the document. And I am not sure whether his question is has he ever seen this statement on

[Page 996]

the document or such a statement, but if he is questioning from the document, I am going to object.

THE COURT: Overruled.

A. Now, repeat your question.

Q. (BY MR. SPOTSWOOD:) My question is, did you, at the time that you took the fire fighter examination, see a piece of paper indicating that among the entrance requirements were that the applicants must be white males?

A. No. I did not.

Q. At the time that you were promoted to lieutenant, which I believe you said was January 1974, were there any black lieutenants —

A. No.

Q. — in the department?

* * *

[Page 998]

Q. (BY MR. JOFFE:) Captain, when you entered the Birmingham Fire Department, were you aware that blacks were not allowed to apply or could not take the test?

A. No. I was not.

Q. Are you aware of that now, today —

A. That is not the case today.

Q. No. Are you aware today that there was a time when blacks were not allowed to take the entrance test?

A. Yes. I have been told that, but at that time, I was not aware. I had never seen a

[Page 999]

form such as he showed me there.

* * *

[Page 1000]

MICHAEL MARTIN,

being first duly sworn, was examined and testified as follows:

* * *

[Page 1001]

Q. When did you begin with the Birmingham Fire Department?

A. August 15th, 1966.

Q. Is that an uninterrupted seniority date?

A. Yes.

* * *

[Page 1020]

Q. (BY MR. HAWLEY:) Captain, I am Greg Hawley with the City and the mayor. You said earlier that August 15th, 1966 was the date of your uninterrupted seniority with the department?

A. Yes.

Q. Were there any black employees in the department at that time?

A. No.

* * *

[Page 1024]

Q. When you were promoted to lieutenant in 1975, were there any black lieutenants on the Birmingham Fire Department?

A. No. There were not.

* * *

[Page 1031]

TONY GENE JACKSON,

being first duly sworn, was examined and testified as follows:

* * *

[Page 1032]

Q. (BY MR. FITZPATRICK:) What is your race, sir?

A. Black.

Q. Who is your current employer?

A. City of Birmingham.

Q. Are you employed in the fire service?

A. That's correct.

Q. What is your present classification?

A. My present classification is station captain.

Q. Did you begin working with the Birmingham Fire and Rescue Service on August the 1st, 1977?

A. That's correct.

Q. And did you apply for promotion to lieutenant in January of 1982 by taking the test?

A. That is — I believe that is correct.

Q. Were you promoted in April of '82 to lieutenant?

A. Correct.

* * *

[Page 1040]

Q. (BY MR. WHIPPLE:) Captain Jackson, were you among the first group of blacks to be promoted to the position of fire lieutenant in the Birmingham Fire and Rescue Service?

A. That's correct.

Q. Were you the first black promoted [to] the position of fire captain and are you now the only black serving as a fire captain in the Birmingham Fire and Rescue Service?

A. That's correct.

* * *

[Page 1042]

Q. Captain Jackson, when you graduated from high school, were you interested in becoming a fire fighter?

A. Yes, I was.

Q. Why didn't you apply to become a fire fighter?

A. Well, at the time of my graduation, I had heard through a friend who said that he had came down to the chief's office to ask about applying for the job as fire fighter, and during our conversation, he told me that the officer that he talked to told him that they weren't

[Page 1043]

hiring Negroes for that position in Birmingham.

* * *

[Page 1060]

BOBBY M. MCKEE,

being first duly sworn, was examined and testified as follows:

* * *

[Page 1060]

Q. (BY MR. DEVANEY:) Captain McKee, when did you begin working for the Birmingham Fire and Rescue Service?

A. June the 14th of 1953.

* * *

[Page 1063]

Q. (BY MR. JOFFE:) Are you aware that at the time you joined the Birmingham Fire Department blacks were precluded from applying for positions?

A. Yes, sir.

Q. Do you know when that situation changed?

A. No, sir, I couldn't give you the date.

* * *

[Page 1068]

Q. Captain McKee, do you know Captain Tony Jackson of the fire and rescue service?

A. Yes, sir.

Q. Can you state whether you ever worked with him personally?

A. Yes, sir.

Q. Where have you worked with him?

A. Station 20, Five Points West.

Q. When did you first work with him at Station 20?

A. September — it was in the first of September of 1980 when I was transferred to Pratt City over there I worked —

Q. What position — I'm sorry.

A. I went on the shift that Jackson was already at 20 on when I went over there.

Q. What position did he hold at that time?

A. Tony was on the snorkel, and I believe he was working assistant — assistant platform operator, I believe, was the position.

[Page 1069]

He wasn't assistant driver, and he wasn't driver, so I believe he was assistant platform operator.

Q. He wasn't an officer at that time?

A. No, sir.

Q. And what position did you hold at that time?

A. I was station Captain.

Q. Based on your — first of all, how long did you work with him when he was a fire fighter before he was promoted to Lieutenant?

A. Approximately a year and a half.

Q. Do you have an opinion of him as a fire fighter?

A. Yes, sir.

Q. What is your opinion?

A. Tony was a good fire fighter. Tony was interesting and everybody liked to work with him. He knew his job pretty well and everything. He did a good job, and he's willing to work. You tell him what you want did, and that's what — that's what Tony would do. He was a good fire fighter.

Q. Did you work with him when he was promoted — after he was promoted to Lieutenant?

A. Yes, sir.

[Page 1070]

Q. Again at Station 20?

A. Yes, sir.

Q. Were you on the same shift?

A. Yes, sir.

Q. Can you explain why you were on the same shift? To me that seems a little unusual that two officers would be on the same shift?

A. Well, what we call double company stations where you have a truck and a snorkel and an engine at the same station that's housed in the same building you have an officer assigned to each piece of the major equipment there. So that would make two Lieutenants on some shifts or a Captain and a Lieutenant on other shifts, and that's why Tony and I were working together.

Q. And if I haven't already asked you that, how long did you work with him when he was a Lieutenant?

A. Ten months.

Q. Do you have an opinion as to his ability as a Lieutenant.

A. Yes, sir, I have an opinion.

Q. Would you express that opinion?

A. Well, he wasn't — he wasn't —

[Page 1071]

wasn't a real good Lieutenant. He wasn't adequate. Tony had problems making decisions. He had problems comprehending fire textbooks that were printed on fire and medical type stuff.

Q. How do you know that?

A. Well, he made some judgments at fires that didn't — that the textbooks had covered and in studying for exams or just plain studying for proficiency in the job and some of these things were covered in these books.

* * *

[Page 1075]

Q. At the time that Mr. Jackson was promoted to the position of Lieutenant, did you feel that he was minimally qualified for the position?

A. No, sir. Tony had never had any experience riding the seat or working in an officer's capacity, making decisions, no, sir.

Q. At the time that he was promoted to the position of Captain, do you have an opinion as to whether he was minimally qualified for that position?

[Page 1076]

A. No, sir, he wasn't qualified for Lieutenant, and he hadn't made any progress toward that direction, no sir.

* * *

[Page 1087]

KENNETH WARE,

being first duly sworn, was examined and testified as follows:

* * *

[Page 1088]

Q. Are you presently employed, sir?

A. Yes, I am.

Q. And where are you employed?

A. I'm employed with the City of Birmingham Engineering Department.

Q. How long have you been employed in the engineering department?

A. Twenty-three years.

Q. What was your first date of employment?

A. January the 2nd, 1963.

Q. And have you been continuously

[Page 1089]

employed by the City engineering department since that date?

A. Yes, I have.

* * *

[Page 1123]

Q. Your employment began with the City in 1963?

A. Correct.

Q. Were there any blacks in the engineering department at the time you joined it?

A. None that I recall.

Q. You worked for three years as a rodman?

A. Correct.

Q. Did you work with any blacks at that

[Page 1124]

time?

A. No.

Q. Do you recall any blacks during that time?

A. Recall any blacks?

Q. Were there any blacks with the department during that time?

A. None that I recall.

Q. Who was the first black hired to a classified position with the engineering department?

A. I don't know.

Q. Do you recall testifying in your deposition that it was in the late 1960's?

A. I think that's correct.

Q. Do you know who that was?

A. I think that it might have been James Franklin.

Q. Who is the first black transitman with the engineering department?

A. I don't know.

Q. Was it Lucius Thomas?

A. It could have been.

Q. Who was the first black chief of party with the engineering department?

[Page 1125]

A. I don't know that either.

Q. Was it Lucius Thomas?

A. Could have been.

Q. Prior to Lucius Thomas' promotion, did the City of Birmingham employ any blacks in civil engineering?

A. No.

Q. Did any black hold a position with the engineering department higher than civil engineer?

A. I don't think so.

Q. Does any black today hold a position higher than the position of civil engineer with the engineering department?

A. I don't think they do.

* * *

[Page 1146]

JACK DUNLAP,

being first duly sworn, was examined and testified as follows:

* * *

[Page 1178]

Q. Did you ever see any job announcements when — at or about the time you came to work for the engineering department?

A. I'm sure I did.

Q. Can you describe generally what they looked like?

[Page 1179]

A. They were on paper. They announced the qualifications.

Q. Do you know whether any of the job announcements for any of the positions in the engineering department restricted applications to white employees?

A. I have an impression that they did, but I don't remember specifically.

MR. FITZPATRICK: Mr. Hoffinger, you just gave me the original.

MR. HOFFINGER: I'm sorry.

Q. (BY MR. HOFFINGER:) Mr. Dunlap, I just handed you Defendant's Exhibits for identification 1982, 1983, 1986, 1988, 1991.

Do these documents refresh your recollection about restrictions, racial restrictions in job announcements in positions with the City at or about the time you joined the engineering department?

MR. FITZPATRICK: I'm going to object, Your Honor, as to whether it refreshs [sic] his recollection until he can identify the document.

THE COURT: Well, I will overrule.

A. It doesn't refresh my memory any. It looks like a standard type document. This says

[Page 1180]

applicants must be white male, eighteen years of age, the one I'm looking at. But I don't remember, you know, that specifically.

Q. (BY MR. HOFFINGER:) Can you identify these documents?

A. They appear to be Personnel Board announcements of job positions.

Q. Do you know if you have ever seen any one of these documents before?

A. I'm sure I have because I read — if these are documents that were issued then, I read the ones that were applicable to me, and I would have read them.

MR. HOFFINGER: I would like to move the admission of these documents into evidence, Your Honor.

MS. MANN: Your Honor, objection. Some of these documents are dated prior to a time when this gentleman was in the engineering department.

MR. HOFFINGER: We can deal with them one at a time, Your Honor.

THE COURT: Well, insofar as Exhibits 1983 and 1982 being announcements dated in 1957, is there any objection to those?

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MS. MANN: Just on relevancy grounds.

THE COURT: All right.

* * *

[Page 1181]

THE COURT: Well, in any event, they certainly appear to be authentic if you are familiar with the form, the way they look, and if necessary, under 91 (B) (4), I'm going to treat them as authenticated.

MR. WHITESIDE: All right.

THE COURT: Is there any objection?

[Page 1182]

MR. WHITESIDE: No objection. I understand they aren't even the City's documents. I apologize, Your Honor.

THE COURT: All right. Exhibits 1983 and 1982 are received. Exhibits 1986, 1991 and 1988 are rejected.

Do you have further examination?

MR. HOFFINGER: Yes, I do.

Q. (BY MR. HOFFINGER:) When were — when was the first black transitman employed by the engineering department?

A. Either the late '60's or early '70's, I would think.

Q. Do you know who that first black transitman would be?

A. I don't — I can remember three black transitmen, but when they were employed, I can't. And that was Frank Sammon, Lucius, Al Jackson. They were probably among the first

ones. I remember other ones, but those are the first ones I remember.

Q. When was the first black chief of party employed by the engineering department?

A. Either the mid or late 70's.

Q. Who was that employee?

[Page 1183]

A. I don't know remember whether Al Jackson or Lucius was the first employed, but they were employed near the same time.

Q. Was Lucius Thomas the first black civil engineer employed by the City?

A. Yes.

Q. Has there ever been an employee of the engineering department — strike that.

Has there ever been a black employee in the engineering department in a position higher than civil engineer?

A. Not to my knowledge.

* * *

[Page 1191]

CHARLES A. BROWNE,

being first duly sworn, was examined and testified as follows:

* * *

[Page 1218]

Q. When you first came with the department, I believe you said it was back in '59 or so?

A. Yeah. Late '58 or early '59.

Q. Were there any blacks in classified positions in the department at that time?

A. Not at that time.

Q. When was the first black hired in a classification position?

[Page 1219]

A. In '68.

Q. When was Mr. Thomas hired by the city?

A. Late '68 or early '69.

Q. So was Mr. Thomas one of the first blacks hired in a classified position in the engineering department?

A. If I'm not mistaken, he was the third.

* * *

[Page 1255]

MS. MANN: Your Honor, at this time, the plaintiffs rest.

THE COURT: All right. Is that both the United States and the private plaintiffs?

MR. FITZPATRICK: Yes, Your Honor.

THE COURT: All right.

MR. FITZPATRICK: I don't have the

[Page 1256]

summary exhibits like the United States. I don't have the word processing capabilities that they have.

THE COURT: All right. I assume the defendants wish to move under Rule 41.

MR. ALEXANDER: Yes, sir.

MR. WHITESIDE: Your Honor, we have a motion we would like to file.

MR. ALEXANDER: We have got some proposed findings as well.

THE COURT: How many words from your word processor?

MR. ALEXANDER: Forty-three, Your Honor. I hope that — we would be pleased to respond orally, but I think the findings set forth the factual contentions and we have briefed the matter extensively.

MR. JOFFE: We join in the motion, Your Honor.

THE COURT: The Court is going to grant the Personnel Board's motion for dismissal. I'm going to deny under the provisions of Rule 41 the other defendants' motion for dismissal subject to hearing additional evidence without prejudice to the presentation.

* * *

[Page 1258]

MR. ALEXANDER: If Your Honor, please, there's some documentary matters that we would like to address. We have offered the transcripts and exhibits from the 1976 and 1979

[Page 1259]

trials in the original United States versus Jefferson County case.

We offer those not for the truth of any matter asserted. We offer them simply as evidence of what was before the Court and the parties to the consent decree at the time it was entered. We have an index of that material which we have furnished to the plaintiffs.

MR. SPOTSWOOD: Your Honor, for the record, Exhibit Number 1977 is the transcript —

THE COURT: Say that again.

MR. SPOTSWOOD: Is 1977. That Exhibit Number is the transcript of the 1976 trial of United States versus Jefferson County.

THE COURT: Which was about what, about a day or a day and a half trial, something like that?

MR. ANGUS: Three days.

THE COURT: Three days?

MR. SPOTSWOOD: Yes, sir. Exhibit 1978 consists of the exhibits introduced into evidence at the 1976 trial. We have a listing of those exhibits.

THE COURT: All right. Exhibit 1978 would be the exhibits themselves, and this index

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or listing of the exhibits would be —

MR. SPOTSWOOD: Your Honor, I give that for the convenience of the Court and the parties to get really through the record. I don't know if it —

THE COURT: We will call that 1978-A.

MR. SPOTSWOOD: 1979 is a transcript of the 1979 trial of United States versus Jefferson County. 1980 is the exhibits introduced into evidence at the 1979 trail, and we have a listing of the 1979 trial exhibits as well.

THE COURT: Which will be shown as 1980-A.

MR. SPOTSWOOD: We offer those exhibits at this time.

THE COURT: They will be received — go ahead.

MR. FITZPATRICK: For the record, Your Honor, Mr. Alexander correctly recognizes that they are hearsay and that they are not offered for the truth of any of the matters contained therein.

The plaintiffs were not parties to that case. The Court of appeals recognized that

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in the prior appeal. As a matter of res judicata or collateral estoppel, we object to any use of the information contained therein that make findings of discrimination that may be applicable to this litigation or against the plaintiffs.

As far as what findings this Court made in prior proceedings, we also object to being bound by those findings. I think this is overkill in terms of volume of material which is of marginal value. The Court can certainly take notice of its 1979 — 1977 order and its 1981 order as well.

But as far as all this other information, there's just so much there as to make it of little usefulness. I recall when that case was appealed, after the intervention proceedings, the Court found it so voluminous that it suggested that this entire record not even be sent to Atlanta. That is enough.

MS. MANN: Your Honor — on behalf of the United States, we would object to exhibits 1977 and 1978 and 1978-A on relevancy grounds. The first trial concerned entry level positions that had nothing to do with the promotional

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process and we would object to those on relevancy grounds.

With respect to exhibits 1979, 1980 and 1980-A which concern the '79 trial, as Your Honor is aware, the United States is not challenging the validity of the decree. We think that the plaintiffs are limited in their ability to challenge the validity.

We think that the Court in United States versus Jefferson County instructed that the plaintiffs should not attempt to reopen or relitigate the earlier proceedings. We would also join the plaintiffs in their objections just on grounds of volume.

MR. FITZPATRICK: Your Honor, one final point, if I may. In the consent — in the City decree and I believe also in the Personnel Board decree, the decree parties waived findings of fact — further findings of fact and further conclusions of law, and they gave up their right to seek any further findings from this Court that they — I am not sure that they are seeking at this time or not.

THE COURT: Well, the ruling is as follows: That as against the private plaintiffs

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in this litigation, these several exhibits, '77 through — 1977 through 1980-A, these will be received for the limited purpose of showing the type of evidence that was presented to the Court as a foundation for first its rulings on the impact and validity of certain entry level tests and the impact and validity of certain additional tests and other screening devices in the 1979 trial.

Insofar as these matters ever being matters that would be submitted to a court of appeals, my assumption is that any court of appeals would do as the earlier one did and namely, not actually want the exhibits themselves ever presented but they are shown as received as against the private plaintiffs for the limited purpose of offer.

As against the United States, they actually could be received for a stronger purpose, at least as to statements made by the United States attorneys during the trial of that case.

However, that would require sifting through to see what the statements were that were made by the United States attorneys in that

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case, and I take it that the defense in limiting their offer are relieving me from this obligation.

MR. ALEXANDER: We reserve our right to sift through at later proceedings if required, but not at this time.

THE COURT: Well, I will just tell you I do not anticipate sifting through —

MR. ALEXANDER: No, sir.

THE COURT: —to look for any matters that might be admissible as against the United States for that purpose, bearing in mind that we have private plaintiffs here against whom that couldn't be used for that purpose. So I think it would be of little utility for that reason.

To the extent the United States and I suppose the private plaintiffs are saying that the earlier proceedings related to entry level jobs, it is my view that that does in no way indicate that

that is irrelevant to the question of promotions, at least not promotions in the same department.

In my view, if you limit somebody's right to become a fireman, you limit their right

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to become a fire lieutenant and a fire captain and I don't think there's any way you can go around that, but that is my view in overruling that objection.

MR. ALEXANDER: Your Honor, the other matters are documentary at this time. They deal with a number of the records of the City and otherwise we assume there will be no authenticity objection and if there is, Mr. Graham is available and we can do it formally.

MR. SPOTSWOOD: Your Honor, the first item — excuse me, the first item is Defendant's Exhibit 1431 and consists of the transcript of the fairness hearing and the exhibits thereto in United States versus Jefferson County.

MR. FITZPATRICK: Your Honor, may I inquire as to the extent of the other exhibits? I thought everything from U.S. versus Jefferson County was already in front of the Court.

THE COURT: No. Up to this point we have just dealt with the '76 and '79 trials.

MR. FITZPATRICK: So anything that happened in between those trials or after those trials are not before the Court, I take it?

THE COURT: Not at this point, as I

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understand it, unless there has been some offer made previously. Maybe some of the items that were introduced at the outset of this trial may have been identified, but I know the consent decree itself certainly was.

MR. FITZPATRICK: May I inquire of counsel as to whether the docket sheets from the earlier proceedings are in the earlier exhibits that you offered?

MR. ALEXANDER: I don't know, but we did furnish the index, that I know.

MR. FITZPATRICK: And how about the pleading files from those earlier?

MR. ALEXANDER: I assume that is the complete set of records.

MR. FITZPATRICK: The pleading files are in there?

MR. ALEXANDER: That is my assumption. It is in the index if it is not.

MR. SPOTSWOOD: I think I can answer that question. These were the exhibits that were actually introduced into evidence at the trial and the transcript of the trial itself. Defendant's Exhibit Number 1431 is the transcript of the fairness hearing with the

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exhibits that were introduced into evidence at the fairness hearing.

There is one exhibit, Exhibit 4, I believe, that the clerk could not locate which is not included in these — in this exhibit.

THE COURT: All right. And I take it —

MR. FITZPATRICK: Same objections as earlier, Your Honor.

THE COURT: Here again, it is being offered for the same kind of purpose as I understand it. Be received on the same limited basis.

* * *

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THE COURT: Was Exhibit 2177 introduced by the intervenor defendants limited to those requests that related to matters of historical discrimination?

MR. JOFFE: Essentially, yes, Your Honor.

THE COURT: I understand the distinction.

* * *

[Page 1305]

MR. FITZPATRICK: Your Honor, I don't

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believe it is in evidence, but the '77 memorandum opinion of this Court — to your knowledge, is it?

MR. ALEXANDER: To my knowledge, it is not.

MR. FITZPATRICK: I tender that only in response to the other orders that they submitted from '77.

MR. ALEXANDER: We have no objection.

THE COURT: The —

MR. FITZPATRICK: Particularly point out the portion which the Court found no intentional discrimination.

THE COURT: Now, there was I believe tendered as Exhibit 1422 the opinion in Seibels versus Ensley dated January 10, '77. Is that — is that different from what you are referring to?

MR. FITZPATRICK: Your Honor, they submitted your order of January 10, '77 but they did not submit your memorandum opinion upon which that order was based.

THE COURT: That may be so. I haven't yet found it in here. Let's see.

MR. SPOTSWOOD: Your Honor, that is correct. We did not submit the memorandum of

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opinion and I believe it would be appropriate to include that.

THE COURT: All right. Why don't we just show that as an attachment to or as a part of Exhibit 1422 which was the — which would go with the order.

MR. FITZPATRICK: I was particularly concerned about calling to the Court's attention the finding of no intentional discrimination.

* * *

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THE COURT: All right. Plaintiffs ready to proceed? Do you wish to divide your time in any way?

MR. FITZPATRICK: We have not set a certain number of minutes. I really don't believe that we are going to use the entire thirty minutes.

Your Honor, we believe we've

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established beyond doubt that race was a controlling factor in each of the contested promotional decisions. I doubt that the defendants could seriously contest that, although they have denied the request for admissions.

At any rate, the use of race in the promotional process here has not been debated. It's clear from Gallant's deposition that he has gone white, black, white, black, right down the line. The City has not claimed, aside from proving that the black promotees are not demonstrably less qualified, we believe and will reassert one last time for the record, that once we've established the use of the unconstitutional factor of race in the promotional process, that the burden should then shift to the City, to the employer, as any other employer, to justify its actions. And if it wishes to justify the action by consent decree, by a valid affirmative action plan, or whatever, it can come into court and do so. They have failed to do so, in our opinion. We believe the evidence clearly demonstrates that.

In 1977, this Court found that the

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Board violated Title 7 in using the entry level fire fighter exam, commencing in April of 1976. The Court's finding as to the date on which liability commenced I believe was vacated by the Court of Appeals. To my knowledge and from my reading of the various subsequent opinions, this Court never made a finding of when the date of liability should have commenced, at least after the Court of Appeals reversed in that narrow area.

This Court made an expressed finding in 1977 that the Board and the other defendants — I'll strike that. I don't want to misrepresent anything.

The Board had not engaged in a 14th Amendment violation in the use of the fire fighter entry level exam. This Court has never made a finding that any of the defendants, including Birmingham, has engaged in a 14th Amendment violation. To the extent we brought a 14th Amendment claim before this Court, there are no prior findings of discrimination in order to be raised in supporting the use of affirmative action in that context.

Moreover, many of the promotees at

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issue in this litigation were hired prior to the commencement of the — the violation which this Court found in the '77 order. If the April '76 date stands, each of the black promotees was asked the date he commenced working for the City, and many of them commenced work prior to that date I believe the evidence also shows that some were after that date.

None of the promotees has in any respect been shown to be an individual victim of discrimination, and the answers to interrogatories of the City which we proffered as evidence during to [sic] your case in chief demonstrates that the City has not gone about trying to identify these black promotees as individual victims. To the extent Stotts applies to promotions and the Court does not have the power to order relief for nonvictims of discrimination, we believe the consent decree as any other order is subject to that limitation under Title 7 and under

the Stotts theories, and I'm not going to debate the Stotts at this time. But under 706G the Court did not have power to order relief for nonvictims.

Finally, Your Honor, with respect to

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the '76 order, if promotional quotas were appropriate, we believe that the Court would have ordered a promotional quota or a promotional goal or any kind of preference at the promotional level in 1977. As it is, this Court ordered, as I understand it, referral goals to the Personnel Board. The Board then referred a certain number of black promotees — black individuals to the City, and the City did not even have an entry level goal.

With respect to additional findings of discrimination beyond those contained in the Court's '77 order, we believe the City as a matter of law is not a competent entity to make findings of discrimination, and many of these points are things that we've raised in briefs over the past two or three years, and I'm not going to try to burden the Court with a recitation of all of these matters.

Nor do we believe has the City claimed to make any findings of past discrimination separate and apart from whatever may be in this Court's record.

Last year Justices Burger, Renquist [sic] and Wright — and White, excuse me, dissented

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from the denial of certiorari in Bush's which has been cited in our pretrial brief. Burger, White and Renquist [sic] found that affirmative action plans should be carefully policed. We believe this Court is being given an opportunity to engage in the careful policing of affirmative action plans here. While this Court approved the decree itself between the parties to that decree, it has never found that the decree has been properly or validly implemented as against the plaintiffs who are before the Court today.

Your Honor, there's a human factor here. There are people behind goals and quotas. Restoring an individual victim to his rightful place is one thing, and on behalf of the plaintiffs we are in favor of restoring individual victims to their rightful place. None of the promotees we believe is an individual victim or at least has not been proven to be, and the City has not found them to be. Pushing ahead less qualified individuals purely on the basis of race is another thing. When one person gets pushed ahead, another one gets pushed aside. The plaintiffs are the human beings that are being pushed aside. And we

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believe that the City has been far too aggressive in pushing aside some employees for the benefit of the others.

Here they are trying to draw a fifty percent quota out of a ten percent pool, and that is in our opinion a — creating a far greater adverse impact on the white employers trying to compete in this system. I don't know if I stated that very well, but the opportunity of getting to the system has a far greater effect on whites than it does on blacks. A black who signs up for the test, makes a minimum score at least according to Personnel Board standards of scoring, has — has an enormous opportunity to make it to the Lieutenants level and beyond at this point in time based on the City's current practices.

In Dade — in the Dade County case, the 11th Circuit held that the use of race in a conclusory fashion is improper even in the context of affirmative action. Here Gallant's deposition demonstrates again they are using race in a conclusory fashion.

It's apparent to us all that we've — we don't have clear guidance from the appellant

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courts on these matters. The split decisions in *Bakke*, the ambiguous decision in [*Fullilove*] and subsequent decisions has — has left us all in a state of flux, and hence we've been warring with each other now for three or four years because of the lack of guidance. Maybe we'll have some guidance this term.

One thing that's clear though at least from Powell's decision in *Bakke* is that race should not be the be-all and end-all in trying to remedy past discrimination if you made appropriate findings. I think *Bakke* finds — Powell's decision in *Bakke*, and I'm not necessarily saying this is right, but at least if one looks at Powell's decision in *Bakke*, race in appropriate situations can be a factor to look at in conjunction with all of the other qualifications.

And taking everybody's qualifications — taking one group's qualifications and comparing them to another and then perhaps taking race into account in that fashion, at least according to Powell, may be appropriate. That's why he recognized the Harvard program as being one — approving the Harvard program while

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finding that at the University of California to be improper where there was a clear set-aside. Here we've got a clear set-aside. Birmingham has set aside a certain number of seats or certain number of Fire Lieutenant positions for blacks only. That's clear from Gallant's deposition again, and really the issue has been framed quite well.

The City has not claimed that we compared all the qualifications and came up with a decision that none of the blacks were demonstrably less qualified. In essence, they said we didn't compare. We just took them right down the line the way they came. So in that — in that — in that view, the issue has been well framed.

The defendants have failed to assert or prove that the decree required or mandated each of the subject promotions. We've demonstrated that each of these individual promotions were not expressly required by the terms of the decree by the differences in qualifications in which we believe we demonstrated using job-related criteria. Ms. Mann will discuss those further.

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In going beyond the terms of the decree the defendants have shown that more was at work here in the system than a carefully tailored affirmative action plan where all of the factors are looked at in carefully determining whether or not in this given promotional decision a black should receive preference. Here it's been just a wholesale use of race, and we don't believe any of the courts of appeals or the Supreme Court have approved that kind of blatant use of race in this type of situation.

This Court recognized in May 1984, in denying the motions to dismiss, that the law has changed since the consent decree was approved by the Court. Here the City was — the Court framed the issue as to whether or not the subject promotions were in fact required or mandated by the decree, and the Court made reference to paragraph two. Since the day Your Honor approved the decree, paragraph two was recognized as a limitation on the goals and quotas in the decree, at least that's our reading of the 1981 opinion in response to the objections which — which I came before Your

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Honor with.

Here the actors, the people controlling the decisions, are more than Chief Gallant and Chief Laughlin. The actors are the Mayor and the personnel director. They prescribe the affirmative action plan. They developed the prototype plan, sent it out to the various departments. If one word in that affirmative action plan varied, they'd kick it back to them and make them follow the prototype plan.

The prototype plan goes far beyond the terms of the decree. At least far beyond the requirements of the decree. To the extent Gallant and Laughlin believed they were complying with those plans, which we don't believe in any respect are valid, they weren't relying on the decree because the plans go far beyond the terms of the decree.

In closing, Your Honor, we've tried to present to you a clean, quick trial in accord with the instructions you gave us. We've identified some objective criteria that we believe is job-

related. We've shown clear differences, obvious differences. We've shown

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that race has been used in a conclusory fashion in the process, and we believe that many, if not all, of these plaintiffs have been the subject of unlawful discrimination. Thank you for your time this week.

MS. MANN: Your Honor, the United States has repeatedly indicated we are not challenging the validity of the decree. We are, however, challenging the City's improper implementation of the decree, the illegal pattern and practice of their implementation. As Mr. Fitzpatrick indicated, we very much disagree with the burden of proof that the Court has imposed upon the plaintiffs. We think it's a burden that no other court has imposed upon Title 7 plaintiffs. However, we believe we've met that burden.

At this point, we believe that we have demonstrated that certain white promotional candidates were demonstrably better qualified than certain black promotees Indeed, Your Honor, we believe that we have shown that certain black promotees were even unqualified. Your Honor, you've had an opportunity to look at the charts that we've used in this case, and

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what we have done is after countless depositions and voluminous discovery, we have taken what we believe to be job-related selection criteria, and we have used those criteria to show that any reasonable person could see that there is a clear and obvious difference between the promotional candidates.

We've established the job-relatedness of these criteria through the testimony of the Battalion Chiefs, the Fire Captains, and we've established that each of these criteria are important considerations in determining the qualifications of an individual for promotion.

With respect to tests, Your Honor, you have presumed the validity of the tests for purposes of this trial, and, therefore, their predictability of job performance. The analysis that we've

done is very similar to a hypothetical question that the city attorneys posed to Chief Gallant during his deposition asking him whether or not —

THE COURT: On A and B?

MS. MANN: That's right. And it's very similar, and Chief Gallant admitted that he

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thought that candidate A was better qualified than candidate B. However, when the consent decree and race were shown into the equation, Chief Gallant changed his opinion as to the person that he would — that he would choose to promote. We don't believe that the consent decree required him to make th promotion of the less qualified, the demonstrably less qualified individual.

Your Honor, for example, and I've just chosen one of our charts, the City's implementation of the decree has resulted, for example, in the promotion of an individual with a statistically significant — a significantly statistically less test score with three years experience. His highest position was plugman, the lowest position on an engine company. He had never served as a lead worker. He had never served as an acting officer. He had no education in fire science. He had no other fire fighting experience.

This person has been promoted over an individual who had seventeen years in the fire department He had served as a lead worker for a hundred and three months. He was certified

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for driver. He had served as an acting officer. This is the position that he was seeking to be promoted to over two hundred and fifty times. He had a degree in fire science.

The City has completely closed their eyes and ears to these qualifications and what Chief Gallant has done is he said I've got a white list, and I've got a black list, and I'm going to go straight down the list. If I'm supposed to promote a black this

time, then, I'm going to take the highest ranking black, and I'm not even going to consider or compare the other individuals.

THE COURT: Let me stop you at that point. Didn't Chief Gallant also say that if you had the same factor white or black with the one exception that the ranking on the test was such that the person with only three years of experience ended up being ranked higher he would with or without the consent decree have promoted that person?

MS. MANN: Your Honor, I'm not sure that I'm following your question.

THE COURT: My understanding of Chief Gallant's testimony is if you take the

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difference in characteristics that you've referred to but modify in effect one item, namely the test score, to the point that then the black — or wouldn't even have to be a black, was actually — who had only the three years of experience, no lead worker training, no drivers certificate, no AAS, et cetera, straight down the line, but if you make that one change, he would have appointed even before 1981 the person with only the three years of experience who had never served as a lead worker, et cetera?

MS. MANN: Your Honor, I think that is his testimony, and I think at that point the United States probably would not be involved in this case. I mean assuming that promotions weren't being made on the basis of race. It might be that the individual who had been — who we believe to be demonstrably better qualified would have a claim under state law in that his qualifications had not been considered and he wasn't promoted on the basis of merit and ability. The United States, though, would not be involved in this case if a less qualified white had been promoted instead of a better qualified white.

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But the fact of the matter is, Your Honor, that once the City undertook to use race as a significant factor in its promotional decisions, we believe at that time there was a corresponding obligation for the City to look at the qualifications of the

people that they were promoting. Chief Gallant said, well, I did things the same way after the decree as I did before, but, Your Honor, there was a difference. Previously Chief Gallant was — was taking the top ranking people off of a single certification, and he knew that these people were certified to him in rank order. After the decree, we have a situation where Chief Gallant is promoting someone who ranked a hundred and seventh, who barely passed the promotional exam over someone who was ranked number three, again without regard to all the rest of his qualifications. And the only other thing that he is throwing into that equation is the race of the individual. We believe that the minute race is thrown into the equations that there was an obligation on the part of the City to look at qualifications.

As Mr. Fitzpatrick indicated, when Your Honor approved the consent decree back in

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1981 Your Honor specifically noted that the goals of the consent decree were made subject to the caveat that the decree was not to be interpreted as requiring the hiring or promotion of demonstrably less qualified persons, and it was because of paragraph two, and the City made assurances that the decree would not result in their abrogating their responsibilities to insure that qualified individuals were promoted, and indeed at one point the City indicated that — that less qualified individuals would not be promoted. Your Honor —

THE COURT: You are referring now to the brief that was filed in one of the —

MS. MANN: Yes, Your Honor.

THE COURT: All right.

MS. MANN: Instead what has happened is there has been — in the case of the fire department, a total disregard for qualifications. In the engineering department, there's been a knowing disregard for qualifications, and solely on the basis of, we believe, an improper interpretation of the goals of the

decree. The decree very clearly provides goals. It does not provide for quotas and there is an abundance of

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evidence in this case to indicate that the — that these goals were being implemented as strict racial quotas.

At one point Chief Gallant said, well, this year I'm going to have to promote two blacks for every white. Your Honor, that is a quota. That is not a goal. It's not a goal that's subject to the availability of qualified applicants, and it's not a goal that is subject to a caveat that nothing shall require the promotion of a less qualified person over a demonstrably better qualified person.

Finally, Your Honor, to the extent that the City seeks to justify its conduct by saying it was mandated by the decree, we feel that the language in the decree is absolutely clear that to the extent a demonstrably less qualified person was promoted this conduct was not mandated, and the City cannot justify its conduct by simply articulating or invoking the decree as a defense to every single employment decision that was made.

To the extent that the City attempts to justify its conduct as remedying past discrimination, there's absolutely no evidence

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that any of these individuals were victims of discrimination, and certainly the way the City has implemented the decree has resulted in a unnecessary trammeling of the interests of these promotional candidates. They were incumbent employees. They spent years studying for these exams. They worked hard. They had fifteen, twenty years seniority, and what they were working for was this promotion, and the City's implementation of the decree has unnecessarily and improperly trammeled their expectations. And I am through.

MR. ALEXANDER: In 1981, Your Honor, the City of Birmingham settled interminable litigation. In exchange it has received interminable litigation. The City enjoys what I suspect is a unique distinction of defending pattern and practice

discrimination claims brought by the United States in favor of whites, blacks and women. Those facts seem to me to illustrate the extraordinary frustration that the City has enjoyed as a result of simply trying to settle a very difficult lawsuit, and by that I mean the original race discrimination case brought against the City, race and sex.

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The City of Birmingham has not enjoyed a good reputation in racial matters. That's not for me to dwell on today. What is for me to dwell on today is that in 1981 when we executed this decree with the private plaintiffs and with the United States, there were no Fire Lieutenants in our fire service, few blacks in our fire department. They have been excluded by custom and by a point in time the Personnel Board ruled. To correct the effects of those problems, we took into account in our decree race. Our decree does contain race and gender preferences. We acknowledged those preferences at the time of the fairness hearing, as did the Court.

The decree overlaps a very strong civil service system. I think the evidence — and basically what I want to do in these short minutes is simply comment on the evidence — demonstrates that there is a strong civil service system and that the City's limits — the City's options with respect to the employees are limited.

It is quite correct that Chief Gallant in the fire department took individuals

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certified for promotion in their rank order. At one time there was a rule of one, after the rule of three was adopted, as the Chief's deposition makes clear, his testimony in this case. That continued to be the case.

The Birmingham consent decree changes that process only in one respect. We now have a supplemental certification that includes black names. We do select those individuals to the extent we can do so on an alternating basis, although it is very

clear from the evidence that there have been periods of time when the City has not had black candidates.

The civil service system suggests and the City is entitled to rely upon that individuals certified to it are qualified. We have done so. Indeed, the only individual, as far as I am aware, in recent history in the fire department who has been rejected was a black individual certified pursuant to the decree for the position of fire lieutenant. I think that confirms the fact that Chief Gallant makes a cut of a sort to make certain that the City does not have unqualified or otherwise deficient individuals in its service.

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The United States, and I suppose the private plaintiffs in lock step, come before this Court with the suggestion that a number of whites are better qualified or demonstrably better qualified. They elect and select to prove their point racially neutral criteria that any reasonable person, I believe the argument goes, would clearly dictate that one individual was demonstrably better qualified than the other. The criteria are transparent. They are — the objective criteria, as they say, are transparent. They are largely contingent upon length of service.

The ranking process is affected by length of service. Individuals are entitled to twenty seniority points, if they have earned them, up to twenty. And Your Honor has the date by which the Court can assess that impact. The length of service is of course just that, length of service. Length of service in a department which did not have a black fire fighter until 1968.

Lead workers certainly strikes me as a reasonable criterion that in an abstract world would make some sense to consider. The

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difficulty is, in the real world there is one black individual who serves as the lead worker in the Birmingham Fire Department. The evidence overwhelmingly suggests that those positions are

allocated on the basis of station seniority or departmental seniority.

In either instance, the past effects of discrimination seem to me to be apparent. EMT-III elected at a point in time, 1972, when at best their would have been one black person eligible to enter into the program, looking at the results of the program now, I believe there is only one black EMT, and that individual is now certified as a fire lieutenant.

Acting officer, again contingent upon lead worker, again contingent upon seniority. Prior experience, I certainly don't suggest that that would have any continuing racial overtones, but I wonder how I would ever be able to advise the fire chief to assess it. I also think that the fire science degree criterion is probably racially neutral. But everything else fits into a perpetuation or perpetuation of a problem that the decree was designed to remedy.

It just seems to me that that is an

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extraordinarily cynical argument to make to the Court, that the supposedly neutral criteria somehow would be the bench mark that we ought to look at.

If we were to adopt these criteria, it would be a very long time before any other black received the promotion to the position of fire lieutenant. The objective, at least in part, of the 1981 consent decree.

We are not unmindful of the rights of whites. The Court undertook to consider those rights, and specifically the Valentine case, when it approved this decree.

It seems to me that the evidence of trammelling is remote. Many of the individuals who are named plaintiffs in this action that had their promotions delayed by a matter of months. Other individuals have had longer delays and even individuals who have, as the expression goes, died on the list, had a continuing opportunity to compete again, the situation again not different from that which had existed prior to the decree.

We are in a very curious situation in the construction of the decree. One of two

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things seems to me to be the end result of the United States' goals in this case. Either we adopt a set of criteria which effectively dismantle the decree, effectively saying yes, we have race-conscious relief, but within this narrow band such that effectively no one can compete, or we end up with the rather hideous prospect for all concerned of being either rather routine and regular litigants in this court. Neither result is desirable, neither result is intended.

We certainly hope that the consent decree that was adopted and approved in 1981 can be permitted to continue on the course that we all set out.

MR. JOFFE: While perhaps not in the excruciating detail as we have heard over the past five days, everthing that we have heard in broad brush, except possibly the voice of the United States, was contemplated when this decree was signed in 1981.

There had been a finding of discrimination in the first trial. More evidence had been presented in the second trial, including evidence of intentional discrimination.

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The United States had argued that experience was not a proper criteria to be used in this context. Negotiations took place. Consent decree was signed. It clearly provided for preferential treatment for blacks and women. No one in this courtroom in August of 1981 had any doubt of that.

Affirmative action was not left up to subjective criteria or seniority-based standards. The City was not to be allowed to so easily wiggle out of its obligations. The intervenors led by Mr. Fitzpatrick raised the objection that white males would be disadvantaged by the decree.

The Court, speaking to Mr. Alexander, said suppose the Personnel Board responds and gives you the names of two blacks and two whites. Suppose the City finds that the two

whites who were certified are demonstrably better qualified than the two blacks who are certified, what is your view in terms of what the City can do under this decree?

Mr. Alexander answered: Assuming that both the whites and the blacks were both qualified but assuming by some standard, and it's a little bit difficult for me to put it in

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a factual context, but some standard the whites were perceived to be better, if the blacks were perceived minimally qualified and we required additional blacks to meet our goals, then we would take them.

The Court recognized in its August '81 opinion that the decree would affect many employment practices and jobs. The Court considered the arguments against the decree. It measured the decree against the standards set down by the Supreme Court in [*Weber*] and found the provisions of the decree well within the limits upheld as permissible in these decisions.

It found that the hiring and promotion of whites was not unduly precluded. Its review indicated that it understood what was going to happen. The City has acted as it was expected to act. But for the confusion engendered by the Eleventh Circuit's language in December of 1983, I have and I hope it's not too presumptuous to say, the belief that these cases would have been dismissed a long time ago.

I think the Court recognized in its decision of this past February that the Eleventh Circuit's decision in Palmer made clear that the

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mandate language in the December 1983 opinion of the Eleventh Circuit would not bear the weight the plaintiffs would put on it. In any event, we have addressed that issue in our papers. And until this Court addresses it, nothing new can be said.

Let me turn [to] two passages in the Court's opinion of February 19th that I consider to be key. The Court said any at-

tempt to assess the relative qualifications of two individuals on the basis of their test scores is a risky process and in a minimum requires knowledge of the magnitude of the difference in their scores, if not also the significance of that difference given the characteristics of the measuring device.

The need for such information under paragraph two of the consent decree is highlighted by the language of that paragraph relieving the City from its minority employment goals only if such minority applicants are demonstrably less qualified.

The Court went on to say it may be, although this appears very doubtful, that the City officials making or recommending promotions

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did on some occasions have sufficient reliable information about these test scores and about the significance of the differences in these scores to have been justified in not promoting minority applicants. We have now listened. We have heard the evidence. And on not one occasion did the City have that information.

I cannot close without reemphasizing a point we have made all along. We would not be here today in the way we are without the intervention of the United States Government. Without in any way disparaging the efforts of Mr. Fitzpatrick and Mr. Jordan for their clients, it is [the] United States which has made this litigation viable, it has given it the patina of respectability. It has made the City, the blacks and even the whites go through a litigation process that should not have taken place.

We are here today because the United States has broken its word, it has gone back on its promises, and it has sought to rewrite history. Not just the blacks but the entire City of Birmingham, white and black, have been betrayed by their [sovereign], that should not have

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happened.

* * *

THE PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA
Room 320 Courthouse, Birmingham
Announces an Open Examination For

ENGINEERING AIDE II, (Tracer)

TIME: 9:00 A. M., Thursday, February 7, 1957.

Each applicant is required to bring a ruler, ruling and lettering pens, and drawing ink to use in the examination.

PLACE: Room 518 Courthouse, Birmingham, Alabama.

SALARY: City of Birmingham: Beginning $258.00, maximum $314.00 per month; 6% deduction for retirement pension and 7% deduction for Federal Social Security.

Jefferson County: Beginning $261.45, maximum $315.00 per month; 7% deduction for Federal Social Security.

APPLICATIONS AND FINAL FILING DATE: Applications may be obtained at the office of the Personnel Board, Room 320 Courthouse, Birmingham, until 4:00 P.M., Tuesday, February 5, 1957.

Applicants applying after February 5, 1957, will be notified when to appear for examination.

PURPOSE OF EXAMINATION: To establish eligible registers from which to fill vacancies in the services of Jefferson County and the City of Birmingham.

ENTRANCE REQUIREMENTS: Applicants must be white, male, 18 years of age, and must not have passed their 35th birthday on the date of appointment, and must meet the qualifications prescribed below.

The residence of applicants is not restricted, but applicants placed on the eligible registers who live in the jurisdiction to be served will be certified first.

REQUIRED KNOWLEDGES, ABILITIES AND TRAINING: Graduation from a standard high school, or equivalent; general knowledge of engineering office practices and engineering subjects; ability to use engineering drawing instruments and to do neat lettering; ability to trace maps, profiles, and various engineering drawings neatly and accurately; ability to make minor detail drawings to scale from sketches and measurements; good knowledge of spelling and ability to solve arithmetic problems of average difficulty; precision; neatness; accuracy; reliability; good judgment; good physical condition and good moral character.

DUTY: Under supervision to trace in ink maps, profiles and various drawings prepared in pencil by Draftsmen and Engineers; make minor detail drawings to scale from sketches and measurements; color maps, prints or photostats with ink or water colors; do related work as assigned.

EXAMINATION SUBJECTS AND WEIGHTS:

Written Test (minimum grade required, 70%)	80%
Training and Experience	20%
Total	100%

MEDICAL EXAMINATION: Eligibles will be required to pass a medical and physical examination upon being selected for appointment.

FINGERPRINTS: All applicants will be fingerprinted at the time of obtaining applications.

Examination No. 5741
Announced November 13, 1956
Reissued January 11, 1957

CASE NUMBER: CV84-P-0903-S
DATE: DEC 16, 1985
DEFENDANT'S EXHIBIT NUMBER 1982

THE PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA
Room 320 Courthouse, Birmingham
Announces an Open Examination for

ENGINEERING AIDE III (RODMAN)

TIME: 3:00 P.M., Tuesday, January 15, 1957.

PLACE: Room 518 Courthouse, Birmingham, Alabama.

SALARY: Jefferson County: Beginning $238.35, maximum $286.65 per month; 2 1/4% deduction for Federal Social Security.

City of Birmingham: Beginning $234, maximum $285 per month; 6% deduction for retirement pension and Federal Social Security.

APPLICATIONS AND FINAL FILING DATE: Applications may be obtained at the office of the Personnel Board, Room 320 Courthouse, Birmingham, until 4:00 P.M., Thursday, January 10, 1957, upon payment of $1.50 application fee.

Applicants applying after January 10, 1957, will be notified when to appear for the next examination.

PURPOSE OF EXAMINATION: To establish eligible registers from which to fill present and future vacancies in the Engineering Departments of Jefferson County and the City of Birmingham.

ENTRANCE REQUIREMENTS: Applicants must be white, male, 18 years of age, and must not have passed their 35th birthday on the date of appointment, and must meet the qualifications prescribed below.

The residence of applicants is not restricted, but applicants placed on the eligible registers who live in the jurisdiction to be served will be certified first.

REQUIRED KNOWLEDGES, ABILITIES AND TRAINING: Graduation from a standard high school, or equivalent; good knowledge of elementary mathematics; manual skill and aptitude for acquiring skill in the use of engineering instruments; ability to understand and follow oral instructions; mental alertness; good judgment; courtesy; dependability; accuracy; good physical condition and good moral character.

DUTIES: Under immediate supervision to do routine work with an engineering survey party and in the office; do related work as required.

TYPICAL TASKS: Work in an engineering field survey party clearing lines of brush, weeds, et cetera; holding level rod and stadia rod in running lines, grades and cross-sections; holding range rod or plumb bob; chaining distances; driving and marking stakes; taking care of instruments.

EXAMINATION SUBJECTS AND WEIGHTS:

Written Test (Minimum Grade Required, 70%)	80%
Training and Experience	20%
Total	100%

MEDICAL EXAMINATION: Eligibles will be required to pass a medical and physical examination upon being selected for permanent appointment.

FINGERPRINTS: All applicants will be fingerprinted at the time of obtaining applications.

Examination No. 5727
Announced October 14, 1955
Revised December 3, 1956

CASE NUMBER: CV84-P-0903-S
DATE: DEC 16, 1985
DEFENDANT'S EXHIBIT NUMBER 1983

ENABLING ACT
(as amended)
of the
PERSONNEL BOARD
OF
JEFFERSON COUNTY

The original law is Act No. 248 of the Alabama Legislature of 1945. Most of the sections have been amended. Citations to these amendments are found at the end of each section.

Occasional references are made to significant court decisions. Other selected statutes that have a bearing on the enabling statute are added at the end of the booklet.

Section 16. Examinations: The director shall prepare and conduct examinations to determine the merit, efficiency and fitness of applicants for positions. Such examinations shall be thorough and practical and shall relate to those matters which fairly test the relative capacity and fitness of the person examined to discharge the duties of the position he seeks. Whenever there is a vacancy in a position in the Classified Service where peculiar and exceptional qualifications of a scientific, professional or educational character are required, and upon satisfactory evidence that for specified reasons competition in such special case is impracticable and that the position can best be filled by the selection of some designated persons of high and recognized attainments in such qualities, the board, upon recommendation of the director, may suspend the examination requirements in such case, but no suspension shall be general in its application to such place or position, and all cases of suspension with the reasons for such action in each case shall be reported to the citizens supervisory commission at its next regular meeting. In the case of laborers, or semi-skilled occupations, the director may rate the applicants solely on experience, physical qualifications and diligence which may be determined by such evidence and in such manner as may be directed by the board. Such applicant may be required to take such further tests as the director with the approval of the board deems necessary. The director shall prepare a list of minimum requirements which the applicants must possess before they are

eligible to participate in any specific examination. He shall determine the relative weight which shall be allowed for written examinations, for oral examinations and for training and experience. The director shall require an applicant to file in the personnel office, in accordance with the rules and regulations, a formal application before he is admitted to any examination. Blank forms for such applications will be furnished by the director. The director may require in connection with applications, such evicence [sic] of residence, citizenship and right to vote and certificates of physicians, public officers, former employers or associates or others having knowledge of the applicant as the good of the service may require. The director may refuse to examine, or after examination refuse to certify as eligible anyone who is found to lack any of the established minimum requirements for the examination or position for which he applies or who is physically so disabled as to be unfit to perform the duties of the position to which he seeks appointment or who has been guilty of crime involving moral turpitude, or infamous or disgraceful conduct or who has been dismissed from the public service for delinquency or misconduct or who has intentionally made a false statement of any material fact or practiced or attempted to practice any deception or fraud in his application, in his examination or in securing his eligibility. Any person appointed to a position who has secured his place on the eligible list through fraud shall be removed by the appointing officer and shall not thereafter be eligible for examination for any position except by unanimous permission of the board. An eligible list containing the names of all persons who successfully passed the examination, ranked in order of their final earned average, from highest to lowest, shall be established as a result of each examination. The effective term of each list shall be fixed by the board at not less than one year. No person shall wilfully or corruptly make a false mark, grade, estimate or report on an examination or with respect to the proper standing of any person examined under the this Act or wilfully or corruptly make any false representation concerning the same or concerning any person examined or furnish to anyone special or secret information for the purpose of improving or injuring the prospects or chances of the appointment, employment or promotion of any person so examined or to be examined. Any person guilty of the above acts shall be deemed

guilty of a misdemeanor. (As amended by Act No. 591, 1967; Act No. 684, 1977.)

Section 17. Efficiency records. The director of personnel shall rate and preserve the records of individual efficiency of all persons holding positions under the provisions of this Act. Such ratings will be submitted on forms prescribed by the director of personnel and will be made by the department heads or their supervising officers or both in accordance with regulations prescribed by the personnel board. Such efficiency ratings shall constitute grounds for: Increase in the rate of compensation for employees who have not attained the maximum rate for the class to which their positions are allotted; continuance at the existing rate of compensation without increase or decrease; decrease in the rate of compensation for the employees who are receiving more than the minimum rate for the class to which their positions are allocated; promotion, demotion, lay-off, transfer or dismissal.

Section 18. Appointments. Vacancies in the classified service shall be filled either by transfer, promotion, appointment, reappointment or demotion. Whenever a vacancy in an existing position is to be filled by appointment the appointing authority shall submit to the director a statement of the title of the position, and if requested by the director to do so, the duties of the position and desired qualifications of the person to be appointed, and a request that the director certify him the names of persons eligible for appointment to the position. The director shall thereupon certify to the appointing authority the names of the three ranking eligibles from the most appropriate register, and if more than one vacancy is to be filled the name of one additional eligible for each additional vacancy, or all the names on the register if there are fewer than three. The director shall, upon the request of the appointing authority, add to any such certification for employment the name of any person who is certified by the director of the division of rehabilitation and crippled children of the state department of education, as being eligible for rehabilitation services, or who is certified by a physician duly licensed to practice medicine in the State of Alabama to have a permanent neurological, muscular, skeletal or other physical impairment rendering such person unable to transport himself from place to place in a normal manner

without the use of transportive devices such as a wheelchair or supportive devices such as braces, crutches, or both; but the director may nevertheless not give preference in certification for employment to any handicapped person if he finds such person is physically or otherwise unfit to perform effectively the duties of the position in which he or she seeks employment. The personnel board shall adopt appropriate rules and regulations governing all appointments to vacancies in the classified service to the end that such rules shall comply with the law and serve the public interest. In the event that a jurisdiction accepts and utilizes Federal funds for the creation of public employment opportunities, such positions when budgeted on a full time basis for twelve months, shall be treated as any other regular position in the classified service. Should the applicable Federal regulations controlling the use of such funds prescribe the unusual or exceptional prerequisites for employment in said program, the director subject to approval of the board, may prescribe the manner in which the position shall be filled and related conditions of employment. If it should prove impossible to locate any of the persons so certified or should it become known to the director that any person is not willing to accept the position, the appointing authority may request that additional names be certified. Within ten days after such names are certified the appointing authority shall appoint one of those whose names are certified to each vacancy which he is to fill. When a new position is created by the governing body the appointing authority shall notify the director of of [sic] the duties of the position and the desired qualifications of the person to be appointed. If there is no appropriate eligible list from which certification can be made, the director shall establish such a list within forty-five days after receipt of the request and no provisional appointment shall be authorized within that time except with the unanimous approval of the board. The appointing authority shall report to the director the name of the person appointed, the effective date of appointment, and such other information as may be required. The names of remaining eligibles certified shall be returned to the eligible list for certification to the next vacancy which may occur. The name of an eligible may be removed from the eligible list after it has been certified and refused three times. All appointments shall be made for a probationary period of twelve months. During

such period the appointing authority may remove an appointee upon filing with the director, in writing, his reasons for such action which action shall not be reviewable. After the expiration of the probationary period the employees shall have earned permanent status subject to the provisions of this subdivision as to removals, suspensions and changes. No person shall be appointed under any title not appropriate to the duties of the position to which he is appointed except by consent of the director. When the position to be filled involves fiduciary or financial responsibility or law enforcement, the appointing power or the board may require the applicant to furnish a reasonable bond or other security in an amount and form to be fixed by the appointing authority subject to the approval of the board provided that where the amount and terms of such bonds are now prescribed by law, such provision of law shall remain in effect. Said bond or security shall be approved by the appointing power and kept by it and conditioned as it prescribes unless otherwise now provided by law. The appointing authority in all cases not excepted or exempted under the provisions of this subdivision or the constitution of the state shall fill positions in the county or municipalities therein, by appointment, including cases of transfer, reinstatement, promotions and demotions, in strict accordance with the provisions of this subdivision and the rules and regulations prescribed from time to time hereunder and not otherwise. In the event an appointing authority fails or refuses to fill a vacancy in an existing position from a certified list of eligibles the director may refuse to certify the payroll, voucher or account of any ineligible person found to be performing the duties of said position. When there is no eligible list from which a vacancy in an existing position may be filled, the director may certify to the appointing authority the names of all person who have filed notice of their intention to take an examination appropriate to the position, and who after investigation appear to have had experience or training which qualify them for the position, and a provisional appointment from among the number may be made by the appointing authority pending the establishment of an eligible list. No provisional appointment shall be continued for a period of over ten days after the establishment of an eligible list and in no event shall be continued for a longer period than four months. During present war emergency period the director may, in the absence

of any appropriate eligible list, authorize a limited tenure appointment without examination. Such appointment shall be for not longer than the duration of the present war emergency plus six months, and shall give persons so appointed no status in the Classified Service by reason of such duration appointment. (As amended by Act No. 591, 1967; Act No. 677, 1977; Act No. 684, 1977.)

Section 20. Promotions. With the discretion of the director of personnel, vacancies in positions shall be filled, in so far as practicable by promotion from among employees holding positions in the classified service. Promotions shall be based upon merit and competition and upon the superior qualifications of the person promoted as shown by his records of efficiency. Upon receipt of a Requisition for Certification from an Appointing Authority, the Director shall thereupon certify, to the Appointing Authority, the names of the three ranking eligibles from the most appropriate register, and if more than one vacancy is to be filled, the name of one additional eligible for each additional vacancy. However, in case of a vacancy in a position which requires peculiar and particular training and experience which, in the judgment of the board, may be properly acquired in the office of [sic] department in which the vacancy exists but not elsewhere, and it can be shown to the satisfaction of the board that there is in such office or department an employee who was regularly appointed and who is serving in a lower or different class or position following regular appointment, and whose familiarity with the duties of the position vacant and whose ascertained merit in performing or assisting in such work make it desirable for the best interests of the service to suspend competition, the board may, after a public hearing, approve the promotion of such employee, either without examination or with such tests or evidence of fitness as the board may see fit to require. Notice of the public hearing held under this section shall be given by mailing or delivering a copy of the notice to each governing body and/or appointing authority and/or department head affected, and by posting a copy of said notice publicly in the office of the board for at least three days prior to said hearing. All such cases shall be fully set forth in the minutes of the board. No suspension of competition for promotion authorized under this section shall be general in its application to such place or position and all such cases of suspension with the reasons for such action in each case shall be reported to the citizens supervisory commission at its next regular meeting. When promotional examinations are given, all employees who attain a passing grade shall have

added to that grade one point for each year of service up to and including twenty years, irrespective of whether such service is continuous or not. (As amended by Act No. 283, 1947; Act No. 684, 1977.)

Section 25. Political Activities Prohibited. No person shall be appointed or promoted to, or demoted or dismissed from any position, or in any way favored or discriminated against with respect to employment because of his political or religious opinions or affiliations or his race. No person shall seek or attempt to use any political endorsement in connection with any appointment to a position. No person shall use or promise to use, directly, or indirectly, any official authority or influence, whether possessed or anticipated, to secure or attempt to secure for any person an appointment or advantage in appointment to a position, or an increase in pay or other advantage in employment in any such position, for the purpose of influencing the vote or political action of any person, or for any consideration. No employee and no member of the board shall, directly or indirectly, pay or promise to pay any assessment, subscription, or contribution for any political organization or purpose, or solicit or take any part in soliciting any such assessment, subscription or contribution. No person shall solicit any such assessment, subscription or contribution of any employee. No employee shall be a member of any national, state or local committee of a political party, or an officer of a partisan political club, or a candidate for nomination or election to any public office, or shall take any part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and cast his vote. Any officer or employee under the jurisdiction of this subdivision who violates any of the foregoing provisions of this section shall forfeit his office or position. Provided that nothing in this section shall be construed so as to deny the right of a public servant to petition his city, county, state or national government. (Amended by Act No. 591, 1967.)

Note: Act No. 819 (1978) in effect revises this section, though Section 25 technically remains part of the statute. Act No. 819 is attached at the end of this Act. See also *Still v. Personnel Board* Jefferson County Circuit Court No. CV-78-503-740-WAT (1980).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

STIPULATION

IT IS HEREBY STIPULATED, by and between the parties, for purposes of this litigation only, that the following facts are deemed to be true and correct:

I. FACTUAL STIPULATIONS

A. Population of Birmingham and Jefferson County, Alabama.

1. In 1960, the population of Jefferson County, Alabama, was approximately 34.6% black and 65.4% white.

2. In 1960, the population of the City of Birmingham, Alabama, was approximately 39.6% black and 60.3% white.

3. In 1960, the labor force in the City of Birmingham, Alabama, was approximately 24.53% black and 75.47% white.

4. In 1960, the labor force of Jefferson County, Alabama, was approximately 30.98% black and 69.12% white.

5. In 1970, the population of Jefferson County, Alabama, was approximately 32% black and 68% white.

6. In 1970, the population of the City of Birmingham, Alabama, was approximately 42.0% black and 57.8% white.

7. In 1970, the civilian labor force in the City of Birmingham, Alabama, was approximately 36% black and 63% white.

8. In 1970, the civilian labor force of Jefferson County, Alabama, was approximately 27.17% black and 72.83% white.

9. In 1980, the population of Jefferson County, Alabama, was approximately 33.3% black and 66.2% white.

10. In 1980, the population of the City of Birmingham, Alabama, was approximately 55.86% black and 44.06% white.

11. In 1980, the civilian labor force in the City of Birmingham, Alabama, was approximately 49.90% black and 50.10% white.

12. In 1980, the civilian labor force of Jefferson County, Alabama, was approximately 28.08% black and 71.92% white.

B. The Classified Work Force of the City of Birmingham.

1. As of January 1, 1966, the City of Birmingham had over 1,600 classified employees: less than one percent (1%) were black.

2. In July 1971, the City of Birmingham had over 2,000 classified employees: less than six percent (6%) were black.

3. In July 1972, the City of Birmingham had over 2,100 classified employees: less than seven percent (7%) were black.

4. In September 1974, the City of Birmingham had at least 2,200 classified employees: less than eight percent (8%) were black.

5. In December 1976, the City of Birmingham had more than 2,200 classified employees: between twenty-three percent (23%) and twenty-five percent (25%) were black.

C. Unclassified Work Force.

1. Between December 1974 and October 1983, the City of Birmingham had an unclassified work force which was between seventy percent (70%) and seventy-seven percent (77%) black.

2. Between 1974 and 1983, the total number of unclassified employees employed by the City of Birmingham fluctuated between 500 and 875.

D. Firefighter Hiring by the City of Birmingham.

1. Between 1965 and 1967, no blacks were hired as firefighters by the City of Birmingham.

2. In 1968, one black was hired by the City of Birmingham as a firefighter.

3. Between 1969 and 1973, no blacks were hired by the City of Birmingham as firefighters.

4. Between 1965 and 1973, approximately 300 individuals were hired by the City of Birmingham as firefighters.

5. As of June 30, 1976, only 9 of the 630 firefighters were black.

6. In 1977, of the 114 individuals hired by the City of Birmingham as firefighters, 34 (29.8%) were black and 80 (70.2%) were white.

7. In 1978, of the 29 individuals hired by the City of Birmingham as firefighters, 9 (31.0%) were black and 20 (69.0%) were white.

8. The following chart sets forth the dates each of the listed individuals obtained the indicated status within the Birmingham Fire and Rescue Service:

Name	Paid as Leadworker	Qualified as Medic	Qualified as Driver/ Asst. Driver
Floyd E. Click	7/17/76		9/71
James D. Morgan	7/17/76		4/75
Joel Allen Day	1/1/77		9/71
Gene E. Northington			1/79
Vincent J. Vella	4/23/77		9/72
			3/74
Lane L. Denard		8/2/76	
Woodrow Laster			
Carl J. Harper			3/78
Tony G. Jackson			8/79
Ebb C. Hinton			5/78
James E. Laster		12/13/80	
Robert K. Wilks	7/17/76		9/74

Name	Paid as Leadworker	Qualified as Medic	Qualified as Driver/ Asst. Driver
Alphonso Davis		1/22/83	5/78
Ray C. McGuire			10/77
Carl V. Cook			
Bruce R. Millsap			7/79
John E. Garvich		3/11/82	7/76
James W. Henson		7/12/81	6/78
Jack A. Freeman	8/20/83		4/83
Eugene Baldwin			8/84
Albert J. Isaac			
Calvin T. Echols			
Jackie E. Barton			
Benjamin F. Garrett			
Stephen C. Carroll			
Alvin B. Von Hagel	1/1/77		2/74
			9/71

E. Fire Lieutenant Promotions in the Birmingham Fire and Rescue Service.

1. Between 1965 and April 23, 1982, no black had ever been promoted to Fire Lieutenant in the City of Birmingham Fire and Rescue Service.

2. The following chart indicates by year the number of whites promoted to and serving as Fire Lieutenant in the Birmingham Fire and Rescue Service:

Year	Promotions to Lieutenant	Incumbent Lieutenants (as of Jan. 1)
1965	7	65
1966	11	67
1967	11	68
1968	11	68
1969	5	72
1970	3	77
1971	5	79
1972	8	81
1973	9	82
1974	16	81

1975	14	92
1976	18	99
1977	13	109
1978	5	111
1979	1	107
1980	1	109
1981	10	102
TOTAL	148	

3. The following chart sets forth by examination those persons promoted to Fire Lieutenant by the Birmingham Fire and Rescue Service:

Examination Date / Name	Race	Register Rank	Promotion Date
October 1980 Exam			
Larry D. Miskelly	White	6	8/22/81*
James L. Wint	White	7	8/22/81*
Robert C. Sorrell	White	8	8/22/81*
James W. Turner	White	9	11/28/81
John S. Payne	White	10	12/12/81

*Official Records reflect this date. Plaintiffs reserve right to challenge this date.

January 1982 Exam			
James A. Bennett	White	1	4/23/82
James E. Laster	Black	23	4/23/82
Ebb C. Hinton	Black	53	4/23/82
Tony G. Jackson	Black	60	4/23/82
Carl J. Harper	Black	95	4/23/82
Woodrow Laster	Black	107	5/15/82
Floyd E. Click	White	2	9/4/82
James D. Morgan	White	3	10/30/82
Joel Allen Day	White	4	1/22/83
Gene E. Northington	White	5	3/19/83
Vincent J. Vella	White	6	3/19/83
Lane L. Denard	White	7	3/19/83

Examination Date / Name	Race	Register Rank	Promotion Date
March 1983 Exam			
Robert L. Brodrecht	White	1	8/6/83
Carlice E. Payne	White	2	8/6/83
Alphonso Davis	Black	80	8/6/83
Ray C. McGuire	Black	83	8/6/83
Carl V. Cook	Black	85	8/6/83
October 1984 Exam			
Jack A. Freeman	White	1	6/8/85
Forney E. Howard	White	2	6/8/85
Alan J. Martin	White	3	6/8/85
Eugene Baldwin	Black	77	6/8/85
Albert J. Isaac	Black	80	6/8/85
Calvin T. Echols	Black	82	6/8/85
Jackie E. Barton	Black	86	6/8/85
Michael J. Sewell	White	4	7/6/85
Robert W. Ezekiel	White	5	7/6/85
Benjamin F. Garrett	Black	87	7/6/85

4. The following chart sets forth by examination those persons certified by the Personnel Board of Jefferson County to the City of Birmingham for the position of Fire Lieutenant but not selected by the City:

Examination Date / Name	Race	Register Rank
October 1980 Exam		
Leo F. Hicks	White	11
Charles R. Owens II	White	12
January 1982 Exam		
Robert K. Wilks	White	8
Raymond K. Harris	White	9
Henry Ward, Jr.	Black	81
Paul Roper, Jr.	Black	96
Ray C. McGuire	Black	111
George C. Gunn	Black	114
Eugene Bald	Black	117

Examination Date Name	Race	Register Rank
March 1983 Exam		
Robert K. Wilks	White	3
R. Bruce Millsap	White	4
John E. Garvich	White	5
James W. Henson	White	6
Jack A. Freeman	White	7
Henry Ward, Jr.	Black	62
Fred Lee Plump	Black	87
October 1984 Exam		
Stephen C. Carroll	White	6
Alvin B. Von Hagel	White	7
John E. Garvich	White	8
Robert K. Wilks	White	9

F. Fire Captain Promotions in the Birmingham Fire and Rescue Service.

1. Between 1965 and September 10, 1983, no black had ever been promoted to Fire Captain in the City of Birmingham Fire and Rescue Service.

2. The following chart indicates by year the number of whites promoted to and serving as Fire Captain in the Birmingham Fire and Rescue Service:

Year	Promotions to Fire Captain	Incumbent Fire Captains (as of Jan. 1)
1965	2	30
1966	7	31
1967	7	30
1968	4	30
1969	1	32
1970	2	33
1971	1	33
1972	5	33
1973	3	31
1974	4	29
1975	3	31

Year	Promotions to Fire Captain	Incumbent Fire Captains (as of Jan. 1)
1976	3	30
1977	3	31
1978	2	31
1979	3	29
1980	0	31
1981	10	28
1982	3	31
TOTAL	63	

3. The following chart sets forth for the August 1983 Fire Captain examination those persons promoted to Fire Captain by the Birmingham Fire and Rescue Service:

Examination Date Name	Race	Register Rank	Promotion Date
Tony G. Jackson	Black	28	9/10/83
David Alan Brand	White	1	9/17/83
Michael W. Martin	White	2	5/12/84
Howard E. Pope	White	3	9/15/84

4. The following chart sets forth for the August 1983 Fire Captain examination those persons certified by the Personnel Board of Jefferson County to the City of Birmingham for the position of Fire Captain but not selected by the City:

Examination Date Name	Race	Register Rank
Charles E. Carlin	White	4
Jimmy Wayne Perkins	White	5

G. Promotion by the City of Birmingham to the Position of Fire Battalion Chief or Higher.

1. Since 1965, no black has ever been promoted to Fire Battalion Chief or any higher rank in the Birmingham Fire and Rescue Service.

2. The following chart indicates by year the number of whites promoted to and serving as Battalion Chief in the Birmingham Fire and Rescue Service:

Year	Promotions to Battalion Chief	Incumbent Battalion Chiefs (as of Jan. 1)
1965	0	14
1966	0	14
1967	6	14
1968	0	14
1969	0	15
1970	2	15
1971	0	16
1972	2	16
1973	0	17
1974	2	15
1975	0	17
1976	0	17
1977	0	17
1978	1	17
1979	1	15
1980	1	17
1981	1	17
1982	0	15
1983	0	18
1984	1	16
TOTAL	17	

H. The Engineering Department of the City of Birmingham.

1. Between 1965 and 1970, less than five percent (5%) of the classified employees in the Engineering Department of the City of Birmingham were black.

2. As of December 31, 1976, there were at least 75 classified employees in the Engineering Department of the City of Birmingham: less than seventeen percent (17%) were black.

3. As of December 31, 1982, the Engineering Department of the City of Birmingham employed ninety-one (91) employees, of whom sixty-eight (68) or approximately seventy-five percent (75%) were white, nineteen (19) or more than twenty percent (20%) were black, four (4) were "other."

4. Between 1965 and September 3, 1982, no black was appointed to the position of Civil Engineer with the Engineering Department in the City of Birmingham.

5. As of January 1, 1982, there were two (2) Civil Engineers with the Engineering Department of the City of Birmingham. Both were white.

6. As of September 5, 1982, Lucius Thomas held one of the two Civil Engineer positions in the Engineering Department of the City of Birmingham. Lucius Thomas is black. The other position was held by a white.

7. Lucius Thomas' position of Civil Engineer was reclassified to Principal Engineering Technician. As of December 1, 1985, there were three Principal Engineering Technicians in the Engineering Department of the City of Birmingham: Two are white, one is black.

8. The following chart sets forth the June 1982 Civil Engineer examination information relating to the promotional candidates for Civil Engineer certified to the City of Birmingham by the Personnel Board of Jefferson County:

Examination Date Name	Race	Register Rank	Promotion Date
David Woodall	White	1	
Kenneth Ware	White	2	
Danny Laughlin	White	3	
Lucius Thomas	Black	9	9/4/82

* * *

III. HISTORICAL DATA

1. This stipulation was developed in the course of this litigation for litigation purposes only.

December 13, 1985

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[Exhibits omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

STIPULATION

IT IS STIPULATED AND AGREED, by and between the parties, through their respective counsel, that the deposition of **O. NEAL GALLANT** may be taken before Gary N. Morgan, Registered Professional Reporter, Commissioner and Notary Public, State at Large, at 1500 Park Place Tower, Birmingham, Alabama, on the 18th day of June, 1985, commencing at 2:05 P.M.

* * *

[Page 168]

Q. Chief, have you ever discriminated against black people?

A. No, I have not.

Q. To your knowledge, has the fire department ever discriminated against black people?

A. No, I don't believe it has.

[Page 169]

Q. Has the fire department or the fire service ever made any studies during your tenure as assistant Chief or Chief of whether it has engaged in discriminatory practices towards blacks?

A. No study that I know of.

[PX 31]

Q. Okay. Has the fire department ever made any findings of discrimination by the fire service?

A. You talking about Birmingham?

Q. Has the Birmingham Fire Service ever made a finding that it has engaged in discrimination toward blacks?

A. No.

MR. ALEXANDER: I'm going to object to the form of the question.

Q. Then your answer is?

A. No.

Q. Okay. They came at the same time. That's why I — Chief, during your tenure as Fire Chief, a number of black persons, black fire fighters, have been promoted to Fire Lieutenant, is that right?

[Page 170]

A. Yes.

Q. Have any of these blacks who have been promoted ever been determined by the fire service to have been victims of racial discrimination?

MR. ALEXANDER: I'm going to object to the form of the question. You may answer.

A. Would you repeat?

Q. Have any of the black persons who have been promoted to Fire Lieutenant during your tenure as Fire Chief ever been determined or found by the fire service or by you to be victims of discrimination?

MR. ALEXANDER: Same objection. You may answer.

Q. Racial discrimination.

A. No.

Q. Have any of the blacks who have been promoted to Fire Lieutenant ever been discriminated against on the basis of their race by the fire service, to your knowledge?

MR. ALEXANDER: Object to the form of the question. You may answer.

[Page 171]

A. No.

Q. Have any of the blacks who have been promoted to Fire Lieutenant ever been discriminated against on the basis of their race, to your knowledge, by the City of Birmingham?

MR. ALEXANDER: I object to the form of the question. You may answer.

A. No.

* * *

[Page 216]

Q. Has the fire service engaged in a process during the past several years of providing preferential consideration to blacks who are certified for a promotion?

MR. ALEXANDER: Object to the form of the question. You may answer.

A. Would you repeat it?

[Page 217]

Q. Would you read it back, please?

(Record read).

A. We operate under a consent decree and affirmative action plan, if this would mean that. We have a consent decree, and we have an affirmative action plan we operate under.

Q. Do you understand those items to require preferential treatment for blacks?

MR. ALEXANDER: Object to the form. You may answer.

A. I understand that there's — in promotions or employing it is set aside in the consent decree that we employ blacks in numbers to whites like that, fifty percent.

Q. Okay. You understand that in the decree fifty percent of the promotions are set aside for blacks?

A. Under the consent decree if they are qualified.

* * *

[Page 233]

Q. Okay. If a firefighter takes the Fire Lieutenants test and is third on the Personnel Board register and that given year seven people are promoted off the list, does that third person have a — an expectation that he would be promoted if found qualified by the Fire Chief?

MR. ALEXANDER: I'm going to object to the form of the question. You may answer.

A. If he — if he knew he was going to be certified third, he would expect to be promoted.

Q. If they were going to make seven promotions that year?

A. He would expect us to promote him if he was certified to us in the third position.

* * *

[Page 236]

Q. Chief, how do you believe one can best determine who is best qualified among a given group of people to perform the duties of a Fire Lieutenant?

A. Repeat that.

Q. Would you read it back, please, Gary?

(Record read).

A. I could get some people in our department, drills and training people, our officers and set us up a system similar maybe to the Personnel Board. However, this would be a big

deal for us. I believe there's a better way than we're selecting them now.

* * *

[Page 243]

Q. Prior to the announcement of the consent decree, did you have any knowledge that promotions in the fire department were the subject of any litigation?

A. Any actual official knowledge of it or just rumor? Rumor was all I had that there was a consent decree, and I didn't know what was in it until I got it.

Q. Okay. Prior to receiving word that a consent decree was signed or the announcement of

[Page 244]

the consent decree or any newspaper reports of the consent decree itself, did you have any knowledge that there were any lawsuits pending that involved promotions in the fire department?

A. Not specifically what it involved. I knew there was some litigation going on.

Q. Did you know that that litigation involved fire department promotions?

A. No, I didn't know really what it involved at all.

Q. Attached to the August 20, 1981 memo which is Exhibit 3 to your deposition is a copy of an executive order from the Mayor, is that correct, page two?

A. It is.

Q. And is that an order which you are required to follow?

A. I am.

Q. And does that order require you to adopt the plan which is attached to the executive order as attachment A?

A. Each department head is — yeah, yes. And —

[Page 245]

Q. And in compliance with this executive order from the Mayor, did you in fact adopt the affirmative action plan based on Exhibit A to the executive order?

A. I did.

Q. Now, did the fire service have any discretion in whether to adopt this plan?

A. No.

* * *

[Page 246]

Q. In filling out the — the — the plan

[Page 247]

for the fire department, did — were there any — was there any investigation of any alleged discriminatory activities of the fire department made?

A. By who?

Q. By you or Chief Laughlin or any of your subordinates.

A. No.

* * *

[Page 249]

Q. Do you have any knowledge of any limitation by the consent decree on the promotion of less qualified persons?

A. I'm not that familiar with that part of it. Mostly what it —

Q. Does the affirmative action plan that you've adopted for the fire department have any provision in it with respect to whether less qualified persons may be promoted?

A. Not that I'm aware of.

* * *

[Page 311]

Q. Do you tell fire fighters who are certified for promotion but not promoted that you would be willing to promote them if that particular individual is reached on the list?

A. Yes.

Q. And as I understand your testimony you just go straight down the list and pick up the next down?

A. Right.

* * *

[Page 325]

Q. At the time Tony Jackson was certified for the position of Captain, did you form a judgment of whether he was qualified to be a Captain?

A. I had no reason to form a judgment at the time he was promoted to a Lieutenant.

Q. I'm talking about when he was promoted to Captain, sir.

A. Give me the question again.

Q. At the time Tony Jackson was promoted to Captain, did you form a judgment as to

[Page 326]

whether he was qualified to perform the duties of a Captain?

A. No, I did not.

Q. You did not?

A. No, I did not.

Q. Did you compare Tony Jackson's — at the time that you promoted Tony Jackson to Captain, did you form an opinion as to whether — strike that again.

At the time you promoted Tony Jackson to Captain, did you compare his qualifications to perform the duties of Fire Captain to those of David Brand?

A. I did not.

Q. At the time you promoted Tony Jackson to Captain, did you compare his qualifications to perform the duties of Fire Captain to those of Mickey Martin?

A. I did not.

Q. And I believe you earlier testified that you did not compare Jackson's qualifications to those of Gene Pope, is that right?

[Page 327]

A. I think so. I don't compare on this.

* * *

[Page 347]

Q. When you received this certification, what process did you go through?

A. Our normal process would have been for Chief Laughlin to have the secretary, whoever the secretary was there, to notify these

[Page 348]

people, set up an appointment for an interview. They would have came in and Chief Laughlin and I would have held an interview with them. And then we would have made a decision, and the decision is over here, action taken. That's the action we have taken.

Q. Upon what factors do you make your decision?

A. On this one with the first — I'm assuming the first certification with any blacks on it. We had promoted the whites before. We had a — six positions to fill, and we promoted — we promoted four blacks and one white off of this list, and we had six positions, so this would have still left us one vacancy.

Q. Other than the fact that you had six factors in the race of the individuals — strike that.

Other than the fact that you had six vacancies and the race of the individuals, did you consider anything else in processing this certification?

A. No, I didn't.

[Page 349]

Q. Did you compare the qualifications of the individuals on the list one to another?

A. Did not.

Q. Did you determine who on the list was the best qualified or lesser qualified?

A. I did not.

Q. Did you make an independent determination with respect to each individual of whether or not they were in fact qualified to perform the duties of Fire Lieutenant?

A. Not other than that they were certified to us as being qualified.

* * *

[Page 350]

Q. As I understand your testimony, you've never at any time determined who on this list is best qualified or lesser qualified or anything of that sort?

A. No.

* * *

[Page 351]

Q. Did you ever make an independent determination separate from the Personnel

[Page 352]

Board's certification of these individuals to you that the individuals on this list, excluding Mr. Ward, were qualified or unqualified?

A. Didn't make any determination.

* * *

Q. If James Laster had been white — if — let's put it this way. If Laster, Hinton, Jackson, Ward and Harper were all white and you got this list of thirteen people, it's your testimony that you would have selected Bennett,

[Page 353]

Click, Morgan, Day, Northington and Vella?

MR. ALEXANDER: Object to the form of the question. You may answer.

Q. Recommended.

MR. ALEXANDER: Same objection. You may answer.

A. I would have went right down from one through six.

Q. Was James Laster's race the controlling factor in his selection for the position of Fire Lieutenant?

MR. ALEXANDER: Object to the form of the question. You may answer.

A. Give it back to me.

(Record read).

A. Under the consent decree and affirmative action, this placed him in a position to be promoted.

Q. So your answer is yes?

A. Yes.

Q. Was Ebb Hinton's race the controlling factor in your recommendation of him for the position of Fire Lieutenant?

[Page 354]

MR. ALEXANDER: Object to the form of the question. You may answer.

A. It was determined by the consent decree and the affirmative action plan that we had that we were to promote blacks.

Q. As I understand your testimony, you had no discretion in the matter?

MR. ALEXANDER: Object to the form of the question. You can answer.

A. Went by the consent decree and the affirmative action plan.

Q. And do you understand them to have required you to promote Laster, Hinton, Jackson and Harper?

MR. ALEXANDER: Object to the form of the question. You can answer.

A. The consent decree did cause us to promote those people.

Q. Did it require you to promote them, sir?

MR. ALEXANDER: Object to the form of the question. You can answer.

A. To meet the consent decree, yes.

[Page 355]

Q. Why did the consent decree require you to promote those persons?

A. Under the consent decree, we had to have an affirmative action plan. The affirmative action plan was to promote on the basis of fifty percent of blacks and whites.

Q. Any other reason, sir?

A. No, there wasn't.

* * *

[Page 365]

Q. Had Woodrow Laster been white would he have been selected from supplement certification 540B?

MR. ALEXANDER: Object to the form. You can answer.

A. No, we would have started at the top one, two, three, four.

Q. You would have selected Floyd Click?

A. Would have.

* * *

[Page 390]

Q. When you received these two certifications, you selected five persons for promotion, is that correct?

A. I did.

Q. And who were the five that you recommended to the Mayor for promotion?

A. R. L. Brodrecht, Carlice Payne, Alphonso Davis, R. C. McGuire and Carl V. Cook.

Q. Did you compare the qualifications of the individuals on these two lists to each other?

A. I did not.

Q. Did you make any determination of whether any of the individuals on the two lists were better qualified than each other?

A. I did not.

Q. Did you make any determination of whether Mr. Wilks was better qualified or less qualified than any of the persons who were promoted?

A. I did not.

Q. Did you make any determination of

[Page 391]

whether Mr. Davis was demonstrably less qualified than Mr. Wilks?

A. I did not.

Q. There was no comparison made whatsoever, is that correct?

A. No, sir. No.

Q. No, no comparison?

A. No, no comparison, yes.

Q. Okay. Why was Mr. Brodrecht selected?

A. He was in number one — he was — we were going to promote five, and he was in number one position.

Q. Did you make a determination of how many whites and how many blacks that you were going to promote?

A. We had promoted more whites on the previous examination than we had blacks. We had got out of our affirmative action plan, but we wasn't going to try to catch it up all at one time, so I determined that we would go back to the one on one. On the new list, we would go back to one on one and not taking into consideration that we had promoted four or five

[Page 392]

blacks, so the first man I promoted was a black. The next man was a — I believe we determined that we would try to get back in line by going one and two instead of one and one.

So we went — we promoted — I don't remember just how we did it, but we wasn't going to — we wasn't trying to catch up all at one time. We knew we were off on our affirmative action plan, and I believe we seemed like we decided we would go one on one — just start out like it was a new ball game and go one on one. I don't know if that reflects this or not. It's been so long ago I don't remember.

Q. Did Mr. Graham approve that plan?

A. When we sent it back through the channels, it came back approved.

Q. Did you talk with him about that before you did it?

A. May have. I believe that I did probably talk to Mr. Graham about it because it was — we were — there was some doubt on the — in my mind on the consent decree whether we would legally need to catch up or whether we had

[Page 393]

some period of time, and I probably did talk to Mr. Graham since he was the City's affirmative action officer.

Q. And what did Mr. Graham tell you?

A. Apparently he said go ahead and do whatever you want to. Because that's what we did. I don't remember just — I don't remember the conversation.

* * *

[Page 395]

Q. Why was Ray McGuire selected?

A. Mr. McGuire was in third position,

[Page 396]

and we had five openings, and we promoted two whites and three blacks.

Q. The same for Mr. Cook in fourth position?

A. Yes.

Q. Were there any other factors that you considered in selecting Davis, McGuire and Cook?

A. None.

Q. Other than where they were on the list and the fact that they were black?

MR. ALEXANDER: Object to the form of the question. You may answer.

A. The number that they were on the list and to fill the affirmative action plan under the consent decree.

Q. Which was to promote blacks?

A. Promote blacks.

* * *

[Page 404]

Q. Pursuant to those two certifications, how many people were selected for promotion to Fire Captain?

A. There was two.

Q. Did you evaluate the qualifications of the people on these two lists?

A. I did not.

Q. Did you compare the qualifications of the people on the two lists?

A. I did not.

* * *

[Page 407]

Q. Chief, do you have a judgment of

[Page 408]

whether on September 10, 1983 David Brand or Tony Jackson was better qualified to perform the duties of a Fire Captain?

A. I don't make that judgment.

Q. You don't — you don't have any judgment one way or another?

A. Not one way or another.

Q. And you don't have a judgment of whether they are equally qualified as well, do you?

A. No. Brand or anybody else or the other people on the same list with him, I cannot — I can't make a judgment.

Q. Chief, not only have you not made judgments that people are better qualified or less qualified than each other, but you haven't determined that they are equally qualified, have you?

A. I have not.

Q. And not only is that true with respect to the Captain promotions, but that's also true with respect to all of these Lieutenant promotions that we've been talking

[Page 409]

about, is that right?

A. I do not compare them. If that's the question you are asking, I do compare them, no.

Q. Okay. And you have not determined that they are equally or relatively — or somewhat equally qualified either?

A. No.

Q. And you've never determined that?

A. Never. Go by the Personnel Board's qualification list.

* * *

[Page 480]

Q. You've never made any determination of whether anybody is better than the other, have you?

A. No, I haven't.

Q. And you've never tried to make that determination?

A. No. The only time that this was even — has been involved since the consent decree was with Henry Ward.

Q. And you weren't comparing Henry to

[Page 481]

any of the other folks on the list, you were just looking at Henry's minimum qualifications?

A. That's correct.

MR. ALEXANDER: Object to the form of the question. You can answer.

A. I didn't compare him with anyone else. I just felt like that he couldn't do the job.

Q. And you've never determined whether any person on any list is better qualified than any of the other people on any list?

MR. ALEXANDER: Object to the form of the question. You can answer.

A. No, I haven't.

Q. So you don't know whether anybody is demonstrably better qualified or demonstrably less qualified than anybody on any list?

MR. ALEXANDER: Object to the form of the question. You can answer it.

A. There's no way I could prove it.

* * *

[Page 489]

Q. So how many whites did you promote

[Page 490]

last time?

A. Promoted three whites.

Q. Three off the white list and four off the black list?

A. Four off the black list, right.

Q. And you are going to promote two blacks and one white this time?

A. No. The last — promoted four — previous to this seven, we had promoted several white Lieutenants. We hadn't — we had run out of the list with blacks on it. I guess that must have been the list that the judge said we couldn't hire any more blacks off of. So I started off with the blacks since a white was the last person. The last person I promoted was a black, so on this list I'll promote a white, a black and a white.

* * *

[Page 493]

Q. You never determined whether or not the whites were demonstrably better qualified or not, did you?

A. I didn't determine one way or the

[Page 494]

other.

* * *

[Page 593]

Q. And, as I understand your previous testimony, you don't assess relative qualifications of candidates certified for promotion, do you?

A. What do you mean by that?

Q. Relative, compare qualifications one to another?

A. No.

* * *

[Page 841]

Q. (BY MR. ALEXANDER:) Chief, I want to pose to you some hypothetical questions about the promotion process as you understand it to be and to have been in the fire service. And I would like for you to answer on the basis of your experience as Fire Chief or assistant Chief and your knowledge about how these decisions have been made in the service. Okay?

A. Yes, sir.

Q. Prior to 1981, and after, say, 1975 or '76, that's the time period I'd like to focus on for the moment. Okay?

A. Yes, sir.

Q. Assuming that there are two white candidates A and B for the positions of Fire Lieutenant, I would like for you to assume the following with respect to the characteristics, if you will, of the two competing candidates. Okay?

A. Yes.

Q. Candidate A has been a fire fighter since 1970. He has served at 3 stations, he has

[Page 842]

advanced to the position of assistant driver, his ratings have been — performance evaluation ratings in the eighties. Okay?

A. Yes, sir.

Q. That's candidate A. Candidate B has been employed in the fire service since 1972. He is a college graduate, he has an associate degree in addition to that from Jeff State, he has four years service in the Air Force in a fire capacity on an Air Force base, he has advanced to the position of leaderman, he has worked at Stations 1 and 6, his performance evaluations have been uniformly ninety-five. Okay.

A. Yes.

Q. With those assumptions in your mind, in your opinion, and based on your experience as Fire Chief, who would be the best qualified as between those two people to perform the duties of a Fire Lieutenant?

MR. FITZPATRICK: Object to the form.

A. B.

Q. All right, sir. Now, assume the

[Page 843]

following additional facts. A has been certified to you as first on a certification of eligibles by the Personnel Board. B has been certified to you as second. As between A and B, and based on your practice as it existed prior to 1981, who would you select?

A. A.

MR. WORTHEN: Object to the form.

Q. Why is that?

A. I would have to have more reason not to. I'd have to have — I'd have to prove that that — that A just couldn't do the job.

Q. Has that been consistent with the way the fire service made selections prior to 1981?

A. It is.

Q. Has that practice changed after 1981?

A. No, it has not.

* * *

[Page 883]

Q. Chief, Mr. Alexander gave you a hypothetical question of persons A and B. Do

[Page 884]

you recall that question?

A. I do.

Q. And I believe you testified that given A and B to choose from for the position of Fire Lieutenant you would have selected B as the best qualified person in response to his first question, is that correct?

A. Yes. That's correct. I said he was the best qualified, in my opinion.

Q. And then you stated that if they were certified to you one and two, A and B, you would have selected A?

A. I would have.

Q. Why was B better qualified to be a Fire Lieutenant than A?

A. Well, just off the top of my head and I assumed that when he said he had a college degree, I assumed it wasn't in basket weaving. When he said he had a fire science course, I assumed that it was from Jefferson State and not from down at Lafayette, Alabama. I was assuming that what he was saying

meant something. If he had a fire science course from down at Lafayette,

[Page 885]

Alabama, I would have just pushed it aside. If he had a college degree in basket weaving, that would have been no good to him, but you said hypothetical, and I was assuming that everything was right, just right.

Q. Okay. And based on that information that Mr. Alexander gave to you, you ascertained that B was better qualified?

A. Yes, I assumed he had a degree in chemistry, he had been to Jeff State to get his fire science course.

Q. Chief, taking all of the facts that Mr. Alexander set forth for you and altering them in this one respect, B is white, A is black, you're given a certification for one position. B is the first person on the first list out of the three people certified, A is first on the second page, you have not yet met your goal, and you're going to promote one person, who would you select?

A. Which list — who was —

Q. B is first on the white list?

A. Okay.

[Page 886]

Q. B is the person you determine to be best qualified. A is black, and he's first on the black list. You've not yet met your goal. Who would you select?

A. I have met — I haven't met my goal, and the last person that was — we haven't met the goal, anyway.

Q. The last person you promoted was white?

A. There you go. You've got me. I'd promote the black.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, *et al.*, *Plaintiffs,* v. RICHARD ARRINGTON, JR., as Mayor of the City of Birmingham; CITY OF BIRMINGHAM, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 82-P-1852-S

CAPTION

DEPOSITION OF GORDON GRAHAM; taken in the above-styled cause pursuant to the Federal Rules of Civil Procedure, at the offices of the Law Department, 6th Floor, City Hall, Birmingham, Alabama, before Jean Crockett, Court Reporter and Notary Public, on the 15th day of November, 1982, commencing at 3:10 p.m.

* * *

[Page 5]

Q. State your name and address, please.

A. Gordon Graham, 921 Essex Road, Birmingham.

* * *

[Page 6]

Q. Okay. Please outline for the record your duties as chief personnel officer for the City of

[Page 7]

[PX 33]

Birmingham. You are still in that same classification as you entered in; is that correct?

A. Yes.

Q. Okay. Would you outline your duties, as such?

A. Yes. My duties are to direct the activities of the office of personnel, which include our personnel records, Affirmative Action, benefits, administration, occupational safety and health plan and labor relations.

* * *

[Page 33]

Q. The mayor has then, in fact, delegated to you the duty of implementing the decree within the City?

A. The prospective relief portion.

* * *

[Page 38]

Q. Have you ever instructed any department head as to how to implement the provisions of para-

[Page 39]

graph number 2 of the Consent Decree?

A. No.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

STIPULATION

IT IS STIPULATED AND AGREED, by and between the parties, through their respective counsel, that the deposition of **EUEL S. LAUGHLIN** may be taken before Donald R. Eaton, Court Reporter, Commissioner and Notary Public, State at Large, at 1500 Park Place Tower, Birmingham, Alabama, on the 15th day of July, 1985, commencing at 1:35 P.M.

* * *

[Page 87]

Q. What have your duties as assistant or deputy chief been?

A. Primarily as operations officer and personnel officer.

* * *

[Page 136]

Q. What is the affirmative action policy of the fire service with respect to promotions?

A. To as far as we can, to promote fifty percent black and fifty percent white if there's enough qualified applicants.

* * *

[Page 173]

[PX 36]

Q. So other than rank order, you also look at the race of the individuals?

A. If — we look to see if they're minorities under the consent decree.

Q. And by minorities, you look at race?

A. Race.

* * *

[Page 188]

Q. In evaluating candidates for promotion to fire lieutenant, do you compare the qualifications of individuals who are certified?

A. No.

* * *

[Page 189]

Q. Was there anything in the consent decree about relative qualifications?

A. There's a term about demonstrably better qualified in the consent decree.

Q. Tell us what your understanding of that term is?

A. I have no understanding of that term. It a subjective term. I don't know what it means.

* * *

[Page 253]

Q. Why was Ebb Hinton selected?

A. To fulfill the requirements of the consent decree. He was the second black.

Q. Had Ebb Hinton have been white, would he have been selected for promotion?

A. On this certification, no.

* * *

[Page 257]

Q. At the time Tony Jackson was selected for promotion to fire lieutenant, what factors did you and Chief Gallant consider?

A. That he was third on the list of blacks.

Q. Anything else, sir?

A. We had no other specific knowledge that I can recall.

* * *

[Page 279]

Q. Does the performance of a lead worker job help one become qualified to perform the

[Page 280]

duties of fire lieutenant?

A. Lead worker is by the nature an acting officer's role and should be of benefit.

* * *

[Page 343]

Q. How was it determined that Alphonso Davis would be promoted?

A. He was the number two on the list of black — promotees, I guess you would —

Q. Anything else enter into the decision to promote Alphonso Davis?

A. Not really.

Q. How was —

A. Nothing to my knowledge at least.

Q. How was it determined that Ray McGuire would be promoted?

A. He was the number two man, black.

Q. Anything else enter into that decision to promote McGuire?

[Page 344]

A. Not to the best of my knowledge.

Q. How was it determined that Carl Cook would be promoted?

A. He was the third black after Ward. We had attempted to reject Ward.

* * *

[Page 345]

Q. Did the fire service make a determination in July of 1983 of whether Robert K. Wilks was qualified?

A. Not at that time.

Q. Did the fire service make a determination of whether Robert B. Millsap was qualified to be a fire lieutenant in July of 1983?

A. Not at that time.

Q. Did John E. — did the fire service make a determination of whether John E. Garvich, Jr. was qualified to be a fire lieutenant in July of 1983?

A. Not at that time.

Q. Did the fire service make a determination of whether James W. Henson was qualified to be a fire lieutenant in July of 1983?

A. Not at that time.

Q. Same question with respect to Freeman?

A. Not at that time.

* * *

[Page 370]

Q. In July of 1983, did you make a determination of whether Robert B. Millsap was qualified for promotion to fire lieutenant?

A. We didn't make any judgment at all. We didn't interview him. He was on vacation and no determination was made at that time.

Q. Was he considered for promotion in July of '83?

A. He was on the certification.

Q. Was he considered by the fire service for promotion?

A. Not at this juncture.

Q. Okay. Had he been black, would he have been considered?

[Page 371]

MR. SPOTSWOOD: Object to the form.

A. I would say yes.

Q. Had Wilks been black, would he have been considered?

A. Yes.

Q. Had Wilks been black would he have been promoted?

A. I would think so.

Q. Had Millsap been black, would he have been promoted?

A. I think so.

* * *

Q. Was John Garvich considered for promotion in July of 1983?

A. Not at that point.

Q. Had John Garvich been black, would he

[Page 372]

have been considered for promotion?

MR. SPOTSWOOD: Object to the form.

A. I think so.

Q. Had John Garvich been black, would he have been considered for promotion in July of 1983?

A. I think so.

Q. Had John Garvich been black, would he have been promoted to fire lieutenant in July of 1983?

A. I think so.

* * *

[Page 431]

Q. Did you seek any facts to confirm whether or not Jackson was minimally qualified to be a fire captain?

A. No. Not to my knowledge.

Q. As I understand your testimony, the decision to promote Jackson was made prior to his interview?

A. Yes.

Q. At any time did you compare the qualifications of Jackson to be a fire captain to those of David Brand to be a fire captain?

A. No.

Q. At any time did you compare the qualifications of Michael Martin to be a fire captain to those of Jackson?

A. No.

Q. At any time did you compare the qualifications of Howard Pope to be a fire captain to those of Jackson?

A. No.

Q. In September of 1983, did you form a

[Page 432]

judgment of whether any of the individuals on certifications 823 and 823-A were better qualified than any of the other individuals?

A. No.

Q. Did you form any judgment of whether any of the individuals on 823 and 823-A were demonstrably less qualified than any of the other individuals on those same certifications?

MR. SPOTSWOOD: Object to the form.

A. No.

* * *

[Page 649]

Q. Chief, looking at the most recent

[Page 650]

certification that you've received from the Personnel Board and the promotions that have been made, would you describe that promotional process as adhering more closely to a goal or a quota?

MR. SPOTSWOOD: Object to the form of the question.

Q. As to fire lieutenant.

A. We average the fifty percent figure that's in the consent decree. I didn't — the word quota or goal didn't enter into my thinking. As the process went on, it gets to be a matter of semantics, I guess. We promoted fifty percent black and fifty percent white.

* * *

OFFICE OF THE MAYOR **Number: 35-81**

Subject: Affirmative Action Officer and Affirmative Action Plan **Page 1 of 1**

Date Effective 8/20/81

Approved:

Applies to: (x) Original Issue ( ) Revision

All Departments

I. The Chief Personnel Officer is hereby appointed Affirmative Action Officer and shall have the following responsibilities:

(a) Advise black and female employees of the terms of the Consent Decree;

(b) Post his or her office hours and location and copies of the Consent Decree in conspicuous places within each department or operational unit of the City;

(c) Receive and investigate complaints of race and sex discrimination and conciliate such complaints when appropriate, and notwithstanding any other provisions of law, establish a written procedure which shall govern such complaints;

(d) Maintain a complete record of all actions taken in pursuit of the duties outlined above, including all correspondence directed to or from the city of Birmingham with respect to any complaints or investigations undertaken pursuant to the Consent Decree; and

(e) To review, prior to that final selection, a department head's written justification for failure to select certified black or female applicants in jobs in which blacks or females are, under the terms of the Decree, underrepresented. The Affirmative Action Officer shall submit his written comments together with the department head's written justification to the Mayor, prior to final selection.

II. Each department head is to submit to the Mayor no later than August 31 of each year an affirmative action plan. The affirmative action plan is to cover a twelve month period beginning each September 1. The form and content of the affirmative action plan is given in Attachment "A".

Department heads will be evaluated, in part, on the basis of their equal employment opportunity and affirmative action efforts and results, as well as their cooperation with the City's Affirmative Action Officer.

ATTACHMENT "A"

AFFIRMATIVE ACTION PLAN
(name of department)
September 1, 1981 through August 31, 1982

I. Statement of Affirmative Action Policy

The (name of department) shall not discriminate on the basis of race, color or sex in recruiting, hiring, promotion, upgrading, training, job assignments, discharge or other disciplinary measures, compensation, or other terms and conditions or privileges of employment. Further, the (name of department) shall not retaliate against or in any way take action against any person because that person opposes or has opposed alleged discriminatory policies or practices in the City of Birmingham, or because of that person's participation in or cooperation with the investigation and trial of alleged discriminatory policies or practices, or in any proceedings therein.

II. Goals for Hiring Blacks and Females

The long term goal of the (name of department), subject to the availability of qualified applicants, is the employ-

ment of blacks and females in each job classification in the department in percentages which approximate their respective percentages in the civilian labor force of Jefferson County. For blacks the percentage is 27.6 and for females is 38.7. In order to achieve this long term goal, the (name of department) has established and will attempt to meet an annual interim goal of making probational appointments of blacks and females to vacancies in permanent, full-time positions in the classified service at the rates set forth in the Consent Decree, or at the rate of black and female representation among applicants, which ever is higher.

III. Workforce Analysis and Interim Annual Hiring Goals

Job Classification	Long Term Goal Met		Interim Annual Hiring Goal	
(list all job classifications in the dept.)	Black (state Yes or No under each heading)	Female	Black (state number to be hired under each heading)	Female

NOTE: Interim annual hiring goals subject to job openings occurring and availability of qualified applicants. (Include this statement as a footnote).

IV. Implementation of Goals

In order to further insure the possibility of achieving the goals for blacks and females, the (name of department) will request the Personnel Board to selectively certify for appointment qualified blacks and females whenever such action is necessary to provide the (name of department) with a certification list that contains sufficient numbers of blacks and females to meet departmental goals. The department shall include on each Request for Certification form to the Personnel Board, a notation requesting the Personnel Board to certify blacks and/or females where race and/or sex goals have not been met. The form of the notation will be as follows:

> "Long term goal for hiring of blacks has not been met. Please certify qualified blacks", and/or "Long term goal for hiring of females has not been met. Please certify qualified females."

In the event that Personnel Board declines, or is unable to furnish lists containing qualified blacks or females, or in the event the Personnel Board declines to eliminate from its consideration of eligibles non-validated promotional potential ratings, the (name of department) notwithstanding any state or local law, shall take whatever actions are required to comply with the terms of the Consent Decree. Such actions may include, but are not limited to:

(a) Directly recruiting blacks or females, for the purpose of supplementing any non-conforming list furnished by the Personnel Board.

(b) Considering existing black and female City employees for promotion, whether or not such candidate was certified by the Personnel Board and supplementing any such non-conforming list furnished by the Personnel Board with such persons as are deemed qualified by the City.

(c) The names and qualifications of blacks and females recruited by the (name of department) will be forwarded to the Affirmative Action Officer for submission to the Personnel Board.

V. Posting of Affirmative Action Plan

A copy of the affirmative action plan for the (name of department), upon approval by the Mayor, shall be posted (specify a conspicuous and prominent place in the main office of the department).

VI. Semi-annual Evaluation Reports

The (name department head title) will submit to the Mayor semi-annual evaluation reports of the department's affirmative action plan. Reports are due by the end of March for the six month period ending with February and by the end of September for the six month period ending with August. Each report shall include a

review of the department's progress in achieving affirmative action plan employment goals, noting the goals which were achieved and those not yet achieved, the reason for any failure to achieve goals, and the remedial action being taken to overcome any such failure. Each report shall also review affirmative action taken to insure compliance with all other provisions of the affirmative action plan.

VII. Job Posting

The (name of department) will post notices of training opportunities and vacancies within the department in either permanent, part-time or temporary positions in conspicuous places at (name the location(s)). Such notices will be posted separately from notices of vacancies in other departments. (For Police, Fire, Street and Sanitation only) The (name of department) will further insure that written notification of promotion or training opportunities within the department are contained on separate bulletin boards from notices of other interdepartmental vacancies and vacancies in other departments.

VIII. Sex Restrictions in Job Announcements and Certifications

The (name of department) shall not request that the Personnel Board restrict any job announcements or certifications on the basis of sex except where, pursuant to a proper validation study, gender is determined to constitute a bona fide occupational qualification within the meaning of Section 703(e) of Title VII for the job(s) listed in such announcements or certifications, and such determination is approved in writing by the United States.

IX. Height/Weight Requirements

The (name of department) shall not use or follow any minimum height or weight requirements which have an adverse impact against blacks of females as selection criteria for any classified service position, nor shall it

abide by any such requirements if they are instituted and administered by the Personnel Board.

X. Eligibility to Apply for Promotion to Certain Jobs

(Include only those paragraphs which apply to your department)

The Police Department shall not require police officers to serve more than three years uninterrupted service in rank (or two years uninterrupted service in rank for candidates who have two years of college credits) in order to be eligible to take the promotional examination for police sergeant, nor shall it require police sergeants to serve more than two years uninterrupted service in rank in order to be eligible to take the promotional examination for police lieutenant. Employees who have obtained permanent status as police lieutenant shall not be deemed ineligible for promotion to the next higher rank based upon any minimum length of service or time in rank. Uninterrupted service shall include any time spent as a probationary employee.

The Fire Department shall not require firefighters to serve more than two years uninterrupted service in rank in order to be eligible to take the promotional examination for the position of fire lieutenant. Employees who have obtained permanent status as fire lieutenant or fire captain shall not be deemed ineligible for promotion to the next higher rank based upon any minimum length of service or time in rank. Uninterrupted service shall include any time spent as a probationary employee.

In order to be eligible to take the promotional examination for the positions of public works supervisor or construction supervisor, an employee must have permanent status as a truck driver, labor supervisor, heavy equipment operator or construction equipment operator. In order to be eligible to take the promotional examination for the position of sanitation inspector, an employee must have permanent status as a truck driver or semi-skilled laborer.

Any employee who was worked full-time in an unclassified laborer position for twelve consecutive months shall be eligible to apply to take the promotional examinations for the following classifications: semi-skilled laborer, truck driver, refuse truck driver, equipment service worker, automotive mechanic helper. As used in this paragraph, the term laborer shall include the classifications of building service worker, laborer, and refuse collector.

Any employee who has obtained permanent status as a semi-skilled laborer or truck driver shall be eligible to apply to take the promotional examinations for the following classifications: truck driver, refuse truck driver, labor supervisor, heavy equipment operator, equipment service worker, autmotive mechanic helper.

Any employee who has obtained permanent status as a truck driver, heavy equipment operator, refuse truck driver, or labor supervisor shall be eligible to apply to take the promotional examination for the classification of construction equipment operator.

The (name of department) will further evaluate career ladders in order to broaden areas of consideration and bases for selection; recommend trainee classes in all instances where feasible; and otherwise eliminate non job-related barriers for promotion to higher level classes.

XI. Promotional Potential Ratings

(For departments other than Police, Fire, Street and Sanitation, and Park and Recreation) The (name of department) will continue to use the Personnel Board's current promotional potential rating system so long as it is shown to have no adverse impact. The (name of department) further agrees to discontinue the use of the Personnel Board's current promotional potential rating system to determine eligibility for promotion where, based upon any two successive rating cycles (one cycle consisting of six months), there is evidence of adverse impact against blacks or females. In determining adverse impact under this paragraph the department will rely upon section 4D

of the *Uniform Guidelines*. The Affirmative Action Officer will be promptly notified of any employee receiving a promotional potential rating of less than 85.

(For Police, Fire, Street and Sanitation, and Park and Recreation) The (name of department) shall discontinue the use of the Personnel Board's current promotional potential rating system since such ratings have been demonstrated to have had an adverse impact on blacks.

XII. Background Investigations

Background investigations will be conducted by the (name of department) in such a manner so as not unlawfully to discriminate on the basis of race or sex. Applicants for employment shall not be disqualified automatically on the basis of an arrest or conviction record, a military discharge that is less than honorable, or a poor credit rating.

In considering the effect of a criminal conviction upon an applicant's qualification, the department shall consider at least the following factors: (1) the nature of the position the applicant is seeking; (2) the nature of the crime; (3) the period of time elapsed since the conviction; and (4) the success or failure of rehabilitation efforts.

The (name of department) agrees that prior to the rejection of an applicant as a result of a background investigation, the applicant will be given a written statement of the reasons for the contemplated rejection and given the opportunity to respond orally or in writing to the reasons five days to the department head. Copies of all correspondence, notes, etc., concerning this paragraph will be sent to the Affirmative Action Officer prior to the rejection of any applicant.

XIII. Supervisory Instruction

The (job title of department head) will inform supervisory personnel that the City will not discriminate against or harass any employee or potential employee on the basis of race or sex. In addition, the (job title of department head) will instruct such personnel about their

responsibility in regard to equal employment opportunity and affirmative action. Supervisory personnel in the (name of department) will be evaluated, in part, on the basis of their equal employment opportunity and affirmative action efforts and results, as well as their cooperation with the City's Affirmative Action Officer.

XIV. Assignment to Jobs

Since a concentration of blacks or females in organizational units and job assignments may indicate bias, the (title of department head) will audit all job assignments of blacks and females in the department and take the necessary steps to eliminate concentration, if any.

XV. Facilities

The (job title of department head) will personally inspect all employee facilities of the department on a semi-annual basis to insure that such facilities are maintained in a racially integrated fashion.

XVI. Affirmative Action Committee

(Police, Fire, and Street and Sanitation only) The (name of department) will appoint an affirmative action committee composed of five members who are City employees, and who may be either incumbents in the (name of department) or individuals selected from outside the department. Such committee shall meet periodically to review the job assignment and disciplinary policies in the department in order to insure that such policies are maintained and administered in a manner that does not unlawfully discriminate against any employee because of race or sex. Such committee shall report quarterly (or more than quarterly if required by specific matters) to the Mayor or his designee. In appointing the members of such committee, the (name of department) shall insure that there are at least two blacks and one female among the members of such committee. Each committee member shall be compensated for committee work at the same rate the committee member receives in his or her job with the City.

CASE NUMBER: CV84-P-0903-S

DATE: DEC 16, 1985

PLAINTIFF'S EXHIBIT NUMBER 180

COMPARISON OF FIREFIGHTER JAMES DOUGLAS MORGAN WITH FIREFIGHTER WOODROW LASTER AS OF MAY 1982

	A.	B.	C.	D.	E.	F.	G.	H.	I.	J.	K.
Name	Raw Score 1/	Converted Score	Final Score	Rank on Register	BFRS Seniority (as of 5/82)	Highest Postal Station Assignment	Certified for Assistant Driver or Driver	Months as Medic or Leaderiter (as of 5/82)	Shifts as Acting Officer (as of 5/82)	Educational Pay Incentive	Other Firefighting Experience
James Douglas Morgan	178 2/	89.09	102.09	3	13	Leaderiter	April 1975	70	175	A.A.S. in Fire Science	—
Woodrow Laster	135 2/	77.36	82.36	107	5	Pilot	—	0	0	A.A.S. in Fire Science	—

1/ Total number of possible correct answers on the January 1982 fire lieutenant examination: 210.

2/ The probability of observing such a disparity in scores, if the true score of Morgan was within 4 standard errors of measurement of that of W. Laster, is .05 or less. Hence, these results are highly statistically significant using normal statistical standards and one must conclude that the true score of Morgan exceeds the true score of W. Laster by at least 4 standard errors of measurement.

[PX 180]

CASE NUMBER: CV84-P-0903-S
DATE: DEC 16, 1985
PLAINTIFF'S EXHIBIT NUMBER 182

COMPARISON OF FIREFIGHTER JOEL ALLEN DAY
WITH FIREFIGHTER WOODROW LASTER
AS OF MAY 1982

Name	A. Raw Score 1/	B. Converted Score	C. Final Score	D. Rank on Register	E. BFRS Seniority (as of 5/82)	F. Highest Formal Station Assignment	G. Certified for Assistant Driver or Driver	H. Months as Medic or Leadworker (as of 5/82)	I. Shifts as Acting Officer (as of 5/82)	J. Educational Pay Incentive	K. Other Firefighting Experience
Joel Allen Day	151	81.73	101.73	4	20	Driver/ Leadworker	July 1971	64	100	—	—
Woodrow Laster	135	77.36	82.36	107	5	Plugman	—	0	0	A.A.S. in Fire Science	—

1/ Total number of possible correct answers on the January 1982 fire lieutenant examination: 210.

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[PX 182]

CASE NUMBER: CV84-P-0903-S
DATE: DEC 16, 1985
PLAINTIFF'S EXHIBIT NUMBER 184

COMPARISON OF FIREFIGHTER LANE DENARD
WITH FIREFIGHTER WOODROW LASTER
AS OF MAY 1982

Name	A. Raw Score 1/	B. Converted Score	C. Final Score	D. Rank on Register	E. BFRS Seniority (as of 5/82)	F. Highest Formal Station Assignment	G. Certified for Assistant Driver or Driver	H. Months as Medic or Leadworker (as of 5/82)	I. Shifts as Acting Officer (as of 5/82)	J. Educational Pay Incentive	K. Other Firefighting Experience
Lane Denard	169 2/	86.64	97.64	7	11	Medic	—	70	150	EMT III	—
Woodrow Laster	135 2/	77.36	82.36	107	5	Plugman	—	0	0	A.A.S in Fire Science	—

1/ Total number of possible correct answers on the January 1982 fire lieutenant examination: 210.

2/ The probability of observing such a disparity in scores, if the true score of Denard was within 3 standard errors of measurement of that of W. Laster, is .05 or less. Hence, these results are highly statistically significant using normal statistical standards and one must conclude that the true score of Denard exceeds the true score of W. Laster by at least 3 standard errors of measurement.

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CASE NUMBER: CV84-P-0903-S

DATE: DEC 16, 1985

PLAINTIFF'S EXHIBIT NUMBER 186

COMPARISON OF FIREFIGHTER BRUCE MILLSAP
WITH FIREFIGHTER CARL COOK
AS OF AUGUST 1983

Name	A. Raw Score 1/	B. Converted Score	C. Final Score	D. Rank on Register	E. BFRS Seniority (as of 8/83)	F. Highest Formal Station Assignment	G. Certified for Assistant Driver or Driver	H. Months as Medic or Leadworker (as of 8/83)	I. Shifts as Acting Officer (as of 8/83)	J. Educational Pay Incentive	K. Other Firefighting Experience
Bruce Millsap	196 2/	94.17	100.17	4	6	Nozzleman	July 1979	0	2 or 3	A.A.S. in Fire Science	--
Carl Cook	122 2/	73.61	81.61	85	9	Assistant Tillerman	--	0	0	--	--

1/ Total number of possible correct answers on the March 1983 fire lieutenant examination: 217.

2/ The probability of observing such a disparity in scores, if the true score of Millsap was within 4 standard errors of measurement of that of Cook, is .05 or less. Hence, these results are highly statistically significant using normal statistical standards and one must conclude that the true score of Millsap exceeds the true score of Cook by at least 4 standard errors of measurement.

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[PX 186]

CASE NUMBER: CV84-P-0903-S

DATE: DEC 16, 1985

PLAINTIFF'S EXHIBIT NUMBER 187

COMPARISON OF FIREFIGHTER JAMES HENSON
WITH FIREFIGHTER CARL COOK
AS OF AUGUST 1983

Name	A. Raw Score 1/	B. Converted Score	C. Final Score	D. Rank on Register	E. BFRS Seniority (as of 8/83)	F. Highest Formal Station Assignment	G. Certified for Assistant Driver or Driver	H. Months as Medic or Leadworker (as of 8/83)	I. Shifts as Acting Officer (as of 8/83)	J. Educational Pay Incentive	K. Other Firefighting Experience
James W. Henson	192 2/	93.06	99.06	6	6	Medic	June 1978	22	2	A.A.S. in Fire Science EMT III	Hillview Fire Department - 3 years, fire-fighter, captain deputy chief, and chief
Carl Cook	122 2/	73.61	81.61	85	9	Assistant Tillerman	--	0	0	--	--

1/ Total number of possible correct answers on the March 1983 fire lieutenant examination: 217.

2/ The probability of observing such a disparity in scores, if the true score of Henson was within 4 standard errors of measurement of that of Cook, is .05 or less. Hence, these results are highly statistically significant using normal statistical standards and one must conclude that the true score of Henson exceeds the true score of Cook by at least 4 standard errors of measurement.

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[PX 187]

CASE NUMBER: CV84-P-0903-S
DATE: DEC 16, 1985
PLAINTIFF'S EXHIBIT NUMBER 188

COMPARISON OF FIREFIGHTER JOHN GARVICH, JR.
WITH FIREFIGHTER CARL COOK
AS OF AUGUST 1983

	A.	B.	C.	D.	E.	F.	G.	H.	I.	J.	K.
Name	Raw Score 1/	Converted Score	Final Score	Rank on Register	BFRS Seniority (as of 8/83)	Highest Formal Station Assignment	Certified for Assistant Driver or Driver	Months as Medic or Leadworker (as of 8/83)	Shifts as Acting Officer (as of 8/83)	Educational Pay Incentive	Other Firefighting Experience
John Garvich, Jr.	182 2/	90.28	99.28	5	9	Nozzleman	July 1976	0	7	A.A.S. in Fire Science	Air National Guard Fire-fighter since 1979
Carl Cook	122 2/	73.61	81.61	85	9	Assistant Tillerman	--	0	0	--	--

1/ Total number of possible correct answers on the March 1983 fire lieutenant examination: 217.

2/ The probability of observing such a disparity in scores, if the true score of Garvich was within 4 standard errors of measurement of that of Cook, is .05 or less. Hence, these results are highly statistically significant using normal statistical standards and one must conclude that the true score of Garvich exceeds the true score of Cook by at least 4 standard errors of measurement.

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CASE NUMBER: CV84-P-0903-S
DATE: DEC 16, 1985
PLAINTIFF'S EXHIBIT NUMBER 189

COMPARISON OF FIREFIGHTER BERNARD VON HAGEL
WITH FIREFIGHTER EUGENE BALDWIN
AS OF MAY 1985

	A.	B.	C.	D.	E.	F.	G.	H.	I.	J.	K.
Name	Raw Score 1/	Converted Score	Final Score	Rank on Register	BFRS Seniority (as of 5/85)	Highest Formal Station Assignment	Certified for Assistant Driver or Driver	Months as Medic or Leadworker (as of 5/85)	Shifts as Acting Officer (as of 5/85)	Educational Pay Incentive	Other Firefighting Experience
Bernard Von Hagel	147 2/	85.77	101.77	7	17	Leadworker	February 1974	101	At least 250	A.A.S. in Fire Science	--
Eugene Baldwin	108 2/	73.71	81.71	77	9	Backup Man	August 1984	0	0	--	--

1/ Total number of possible correct answers on the October 1984 fire lieutenant examination: 193.

2/ The probability of observing such a disparity in scores, if the true score of Von Hagel was within 2 standard errors of measurement of that of Baldwin, is .05 or less. Hence, these results are highly statistically significant using normal statistical standards and one must conclude that the true score of Von Hagel exceeds the true score of Baldwin by at least 2 standard errors of measurement.

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CASE NUMBER: CV84-P-0903-S
DATE: DEC 16, 1985
PLAINTIFF'S EXHIBIT NUMBER 190

COMPARISON OF FIREFIGHTER BERNARD VON HAGEL
WITH FIREFIGHTER ALBERT ISAAC
AS OF MAY 1985

	A.	B.	C.	D.	E.	F.	G.	H.	I.	J.	K.
Name	Raw Score 1/	Converted Score	Final Score	Rank on Register	BFRS Seniority (as of 5/85)	Highest Formal Station Assignment	Certified for Assistant Driver or Driver	Months as Medic or Leadworker (as of 5/85)	Shifts as Acting Officer (as of 5/85)	Educational Pay Incentive	Other Firefighting Experience
Bernard Von Hagel	147 2/	85.77	101.77	7	17	Leadworker	February 1974	101	At least 250	A.A.S. in Fire Science	—
Albert Isaac	111 2/	74.64	80.64	80	7	Backup man	—	0	0	—	—

1/ Total number of possible correct answers on the October 1984 fire lieutenant examination: 193.

2/ The probability of observing such a disparity in scores, if the true score of Von Hagel was within 2 standard errors of measurement of that of Isaac, is .05 or less. Hence, these results are highly statistically significant using normal statistical standards and one must conclude that the true score of Von Hagel exceeds the true score of Isaac by at least 2 standard errors of measurement.

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[PX 190]

CASE NUMBER: CV84-P-0903-S
DATE: DEC 16, 1985
PLAINTIFF'S EXHIBIT NUMBER 192

COMPARISON OF FIREFIGHTER JOHN GARVICH, JR.
WITH FIREFIGHTER ALBERT ISAAC
AS OF MAY 1985

	A.	B.	C.	D.	E.	F.	G.	H.	I.	J.	K.
Name	Raw Score 1/	Converted Score	Final Score	Rank on Register	BFRS Seniority (as of 5/85)	Highest Formal Station Assignment	Certified for Assistant Driver or Driver	Months as Medic or Leadworker (as of 5/85)	Shifts as Acting Officer (as of 5/85)	Educational Pay Incentive	Other Firefighting Experience
John Garvich, Jr.	166 2/	91.65	101.65	8	11	Medic	July 1976	12	13	A.A.S. in Fire Science EMT III	Firefighter in Air National Guard since 1979
Albert Isaac	111 2/	74.64	80.64	80	7	Backup man	—	0	0	—	—

1/ Total number of possible correct answers on the October 1984 fire lieutenant examination: 193.

2/ The probability of observing such a disparity in scores, if the true score of Garvich was within 4 standard errors of measurement of that of Isaac, is .05 or less. Hence, these results are highly statistically significant using normal statistical standards and one must conclude that the true score of Garvich exceeds the true score of Isaac by at least 4 standard errors of measurement.

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CASE NUMBER: CV84-P-0903-S
DATE: DEC 16, 1985
PLAINTIFF'S EXHIBIT NUMBER 193

COMPARISON OF FIREFIGHTER JOHN GARVICH, JR.
WITH FIREFIGHTER EUGENE BALDWIN
AS OF MAY 1985

Name	A. Raw Score 1/	B. Converted Score	C. Final Score	D. Rank on Register	E. BFRS Seniority (as of 5/85)	F. Highest Formal Station Assignment	G. Certified for Assistant Driver or Driver	H. Months as Medic or Leadworker (as of 5/85)	I. Shifts as Acting Officer (as of 5/85)	J. Educational Pay Incentive	K. Other Firefighting Experience
John Garvich, Jr.	166 2/	91.65	101.65	8	11	Medic	July 1976	12	13	A.A.S. in Fire Science EMT III	Firefighter in Air National Guard since 1979
Eugene Baldwin	108 2/	73.71	81.71	77	9	Backup man	August 1984	0	0	—	—

1/ Total number of possible correct answers on the October 1984 fire lieutenant examination: 193.

2/ The probability of observing such a disparity in scores, if the true score of Garvich was within 4 standard errors of measurement of that of Baldwin, is .05 or less. Hence, these results are highly statistically significant using normal statistical standards and one must conclude that the true score of Garvich exceeds the true score of Baldwin by at least 4 standard errors of measurement.

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CASE NUMBER: CV84-P-0903-S
DATE: DEC 16, 1985
PLAINTIFF'S EXHIBIT NUMBER 194

COMPARISON OF FIREFIGHTER JOHN GARVICH, JR.
WITH FIREFIGHTER BENJAMIN GARRETT
AS OF JULY 1985

Name	A. Raw Score 1/	B. Converted Score	C. Final Score	D. Rank on Register	E. BFRS Seniority (as of 7/85)	F. Highest Formal Station Assignment	G. Certified for Assistant Driver or Driver	H. Months as Medic or Leadworker (as of 7/85)	I. Shifts as Acting Officer (as of 7/85)	J. Educational Pay Incentive	K. Other Firefighting Experience
John Garvich, Jr.	166 2/	91.65	101.65	8	11	Medic	July 1976	12	13	A.A.S. in Fire Science EMT III	Firefighter in Air National Guard since 1979
Benjamin Garrett	111 2/	74.64	77.64	87	3	Plugman	—	0	0	—	—

1/ Total number of possible correct answers on the October 1984 fire lieutenant examination: 193.

2/ The probability of observing such a disparity in scores, if the true score of Garvich was within 4 standard errors of measurement of that of Garrett, is .05 or less. Hence, these results are highly statistically significant using normal statistical standards and one must conclude that the true score of Garvich exceeds the true score of Garrett by at least 4 standard errors of measurement.

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CASE NUMBER: CV84-P-0903-S
DATE: DEC 16, 1985
PLAINTIFF'S EXHIBIT NUMBER 195

COMPARISON OF FIRE LIEUTENANT EUGENE POPE
WITH FIRE LIEUTENANT TONY JACKSON
AS OF SEPTEMBER 1983

	A.	B.	C.	D.	E.	F.	G.	H.	I.	J.
Name	Raw Score 1/	Converted Score	Final Score	Rank on Register	BFRS Seniority (as of 9/83)	Certified for Assistant Driver or Driver	Months as Fire Lieutenant (as of 9/83)	Shifts as Acting Captain (as of 9/83)	Educational Pay Incentive	Other Firefighting Experience
Eugene Pope	159	82.47	102.47	3	24	July 1959 September 1972	116	40	A.A.S. in Fire Science	--
Tony Jackson	129	70.78	77.78	28	6	August 1979	17	0	--	--

1/ Total number of possible correct answers on the August 1983 fire captain examination: 204.

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[PX 195]

CASE NUMBER: CV84-P-0903-S
DATE: DEC 16, 1985
PLAINTIFF'S EXHIBIT NUMBER 196

COMPARISON OF FIRE LIEUTENANT MICHAEL MARTIN
WITH FIRE LIEUTENANT TONY JACKSON
AS OF SEPTEMBER 1983

	A.	B.	C.	D.	E.	F.	G.	H.	I.	J.
Name	Raw Score 1/	Converted Score	Final Score	Rank on Register	BFRS Seniority (as of 9/83)	Certified for Assistant Driver or Driver	Months as Fire Lieutenant (as of 9/83)	Shifts as Acting Captain (as of 9/83)	Educational Pay Incentive	Other Firefighting Experience
Michael Martin	167 2/	85.58	102.58	2	17	--	93	0	A.A.S. in Fire Science	--
Tony Jackson	129 2/	70.78	77.78	28	6	August 1979	17	0	--	--

1/ Total number of possible correct answers on the August 1983 fire captain examination: 204.

2/ The probability of observing such a disparity in scores, if the true score of Martin was within 2 standard errors of measurement of that of Jackson , is .05 or less. Hence, these results are highly statistically significant using normal statistical standards and one must conclude that the true score of Martin exceeds the true score of Jackson by at least 2 standard errors of measurement.

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[PX 196]

CASE NUMBER: CV84-P-0903-S

DATE: DEC 16, 1985

PLAINTIFF'S EXHIBIT NUMBER 197

COMPARISON OF FIRE LIEUTENANT CHARLES CARLIN
WITH FIRE LIEUTENANT TONY JACKSON
AS OF SEPTEMBER 1983

	A.	B.	C.	D.	E.	F.	G.	H.	I.	J.
Name	Raw Score 1/	Converted Score	Final Score	Rank on Register	BFRS Seniority (as of 9/83)	Certified for Assistant Driver or Driver	Months as Fire Lieutenant (as of 9/83)	Shifts as Acting Captain (as of 9/83)	Educational Pay Incentive	Other Firefighting Experience
Charles Carlin	157	81.69	100.69	4	19	April 1973	114	30	A.A.S. in Fire Science	--
Tony Jackson	129	70.78	77.78	28	6	August 1979	17	0	--	--

1/ Total number of possible correct answers on the August 1983 fire captain examination: 204.

500

[PX 197]

COMPARISON OF FIREFIGHTER FLOYD CLICK
WITH FIREFIGHTER WOODROW LASTER
AS OF MAY 1982

	A.	B.	C.	D.	E.	F.	G.	H.	I.	J.	K.
Name	Raw Score 1/	Converted Score	Final Score	Rank on Register	BFRS Seniority (as of 5/82)	Highest Formal Station Assignment	Certified for Assistant Driver or Driver	Months as Medic or Leadworker (as of 5/82)	Shifts as Acting Officer (as of 5/82)	Educational Pay Incentive	Other Firefighting Experience
Floyd Click	160 2/	89.64	102.64	2	13	Leadworker	July 1971	70	150	--	11 months as "Training Officer" of Shady Grove Volunteer Fire Department
Woodrow Laster	135 2/	77 36	82.36	107	5	Plugman	--	0	0	A.A.S. in Fire Science	--

501

1/ Total number of possible correct answers on the January 1982 fire lieutenant examination: 210.

2/ The probability of observing such a disparity in scores, if the true score of Click was within 4 standard errors of measurement of that of W. Laster, is .05 or less. Hence, these results are highly statistically significant using normal statistical standards and one must conclude that the true score of Click exceeds the true score of W. Laster by at least 4 standard errors of measurement.

[PX 496]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

STIPULATION

IT IS STIPULATED AND AGREED, by and between the parties, through their respective counsel, that the deposition of **GORDON GRAHAM** may be taken before Gary N. Morgan, Registered Professional Reporter, Commissioner and Notary Public, State at Large, at 1500 Park Place Tower, Birmingham, Alabama, on the 20th day of August, 1985, commencing at 9:07 A.M.

* * *

[Page 41]

Q. (BY MS. MANN:) Mr. Graham, let me ask you to look at what's been marked as United States Exhibit Number 2 which is an eight-page document and ask you to identify that, please, sir.

A. This is a copy of executive order 35-81 dealing with affirmative action officer and affirmative action plan and a cover letter dated August 20, 1981 from the Mayor to department heads transmitting a copy of the executive order and announcing a department head meeting to discuss the attachment.

Q. Which portion, if any, of Exhibit Number 2 were you responsible for drafting?

A. I drafted the — the exhibit.

Q. When you say the exhibit, are you talking about all eight pages?

[PX 400]

[Page 42]

A. Yes.

* * *

[Page 44]

Q. What was the source, if any, for the information that you put in the affirmative — the affirmative action plan that's attached as exhibit A?

A. Basically the — it's from the consent decree.

Q. Are there any provisions in the affirmative action plan that were taken from or reflect paragraph two of the consent decree?

A. No.

Q. Why aren't there any provisions that

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reflect paragraph two of the consent decree?

A. Paragraph two at that time was not an issue.

Q. When you say it was not an issue, what do you mean by that?

A. Just that it wasn't an item that was a critical item.

* * *

[Page 46]

Q. I believe your earlier testimony was that in August of 1981 paragraph two was not an issue, it was not a critical item. How has your understanding of paragraph two changed from August of 1981 to the present?

[Page 47]

A. My understanding hasn't changed.

Q. All right. Has the effect of paragraph two on the City's implementation of the consent decree changed from August of 1981 to the present?

MR. ALEXANDER: I object to the form. You can answer.

A. No.

Q. Has language from paragraph two been included in any affirmative action plan of any City department since 1981?

A. I don't recall any — any language. I think most of the departments have — it's — I see it's in the — the statement. It's on page three of the prototype plan, article three interim annual hiring goals subject to job openings occurring and availability of qualified applicants.

Q. All right. Now, which portion of that note do you — are you referring to when you say language from paragraph two?

A. I'm not saying that's from paragraph two.

[Page 48]

Q. Okay. I'm sorry.

A. I'm saying to my knowledge the only — to my knowledge, there's no statement in the department affirmative action plan referencing paragraph two, but this is a note that speaks to qualification of applicants.

Q. Why did you not think that paragraph two was a critical item when you drafted the prototype affirmative action plan?

A. Basically for the reasons that I have previously stated.

Q. And would you state them for me one more time?

A. It was a permissive paragraph put in to protect the City making it — stating that we would not be required to hire unnecessary people, people not qualified or those demonstrably less qualified according to some job-related selection procedure.

Q. When you say it was a permissive paragraph, what do you mean by that?

A. If the City, which it wouldn't, wanted to hire somebody it didn't need, it could

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do so.

Q. Was there anything else that the City could do, if it wanted to?

A. Under paragraph two?

Q. Yes, sir.

A. I would assume it could do any of those items listed under paragraph two.

Q. Which would be?

A. Hire unnecessary personnel, hire personnel that are not qualified, hire personnel that are demonstrably less qualified, based upon some job-related selection procedure.

* * *

[Page 61]

Q. Now, my question, Mr. Graham, if a department head does not select a female or a black who has been certified, it's my understanding that the department head then has to in writing explain why that person has not been selected, is that correct?

A. If it's in a job classification in a department where the long-term goal for blacks or females had not been met.

Q. Okay. In that setting, is it your understanding that the department head must establish in writing that the female or black was unqualified for the particular job as the reason for not selecting that person, or is there another standard that you apply?

MR. ATKINS: Object to the form.

[Page 62]

A. There is no standard as such other than the department head's assessment of that particular individual for that particular job.

Q. When you receive the written comments of the department head explaining why he or she has not selected a female or

black who has been certified for a particular job, and this is the situation where the long-term goals have not been met, what standard do you apply in determining whether or not to accept or reject their explanation for why this person wasn't chosen?

A. There is no standard other than to satisfy myself that there is sufficient reason not to appoint that individual.

* * *

[Page 139]

Q. (BY MS. MANN:) Are there any promotions within the City that you believe paragraph two has an impact on or affects?

MR. ATKINS: Object to form.

A. I don't know of any unnecessary personnel that we've hired. I don't know of any

[Page 140]

unqualified personnel that we've hired, and whatever the third part of that paragraph means, I'm not aware of any that we've hired.

Q. Mr. Graham, looking at the operations of the consent decree prospectively from this minute on, do you have an understanding as to whether or not paragraph two in any way impacts on or has an effect on promotional processes within the City?

MR. ATKINS: Object to form.

A. Nothing other than what I've already testified to.

Q. Do you have an understanding of the meaning of the term demonstrably as used in paragraph two?

A. No.

Q. Have you ever sought to ascertain what the term demonstrably means as used in paragraph two?

A. Sought to ascertain, no.

Q. Who is the person or persons within the City charged with enforcing the consent decree?

[Page 141]

A. Enforcing it? I assume the Court would enforce it.

Q. What person or persons within the City are charged with implementing the consent decree?

A. The Mayor is — would be primarily responsible. He's delegated certain aspects of the consent decree to me.

Q. What aspects of the consent decree has the Mayor delegated to you?

A. He's named me as affirmative action officer.

* * *

[Page 187]

Q. Let's go back to my Fire Lieutenant hypothetical and let's assume that we have no black Fire Lieutenants. You've gotten openings, no promotions have been made in 1985 and the fire department receives a certification and supplemental certification from the Personnel Board, and he finds — the Fire Chief finds all of the individuals certified to be minimally qualified for promotion to Fire Lieutenant, but he finds all of the whites on the certification — we have no blacks on the original certification. He finds all of the whites to be better qualified. What discretion does the department head have in determining how many of those promotions go to whites and how many go to blacks?

* * *

[Page 188]

A. The department head has full discretion as to what promotion decisions to make.

* * *

[Page 189]

Q. Would you have any objection to the department head choosing the ten whites over the blacks?

A. He's got all qualified candidates, there were no black Lieutenants, and he had an opportunity to promote blacks to Lieutenant, I would send that recommendation back to him to be reconsidered.

Q. And what would you ask him to

[Page 190]

reconsider it in light of? What factors should he reconsider it based on?

A. If he makes the same recommendation, provide additional information.

Q. And assume he does make the same recommendation and provides you with additional justification as to why he thinks all of the whites are better qualified and why all of the blacks are minimally qualified based on factors that you believe to be job related, would you then allow those promotions to be made?

A. Probably not.

Q. And why is that?

A. In my judgment, he would not have complied with the requirements of the consent decree.

Q. And which requirements would he have not complied with?

A. To attempt to promote qualified blacks where blacks are underrepresented.

Q. How many of those positions of the ten promotional openings would he have to fill with blacks for him, in your opinion, to meet

[Page 191]

the requirements of the consent decree?

A. In the fact situation you have described, five.

(Off-the-record discussion).

Q. Mr. Graham, what if — the same situation, the Fire Chief comes back to you after he initially says I find all ten whites to be better qualified based on job-related selection procedures, and he comes back and he says I have carefully reviewed the situation, and I've carefully reviewed the consent decree, and not only do I find all ten whites to be better qualified, but I find them to be demonstrably better qualified based on job-related selection procedures than all ten blacks who I find — or than all blacks that have been certified, would that additional justification, in your opinion, in any way change what you have described as the requirements of the consent decree?

A. No.

* * *

[Page 423]

Q. What criteria does the City expect its department heads to use in judging qualifications?

A. There are no formal criteria established. Department heads use their professional judgment.

Q. And the City has established no criteria for department heads to use in assessing qualifications of candidates certified

[Page 424]

for jobs with the City?

A. The wording of your question confuses me.

Q. Which part?

A. The City has not established any criteria for assessing candidate qualification.

Q. Do the department heads establish criteria for assessing qualifications of employees certified for jobs with the City?

A. Each department head satisfies in his or her mind what qualifications they want as openings occur.

Q. What criteria does Chief Gallant use in the fire service to assess qualifications of candidates certified for jobs in the fire service be they entry level or promotional?

A. I'm not certain what criteria he has established.

Q. Do you know if he has established any criteria?

A. No, other than to satisfy himself that people can do the job.

Q. Have you ever discussed with Chief

[Page 425]

Gallant whether he uses any criteria in assessing qualifications of persons certified for entry level or promotional positions in the fire service?

A. No.

Q. Has the City or the fire service attempted to validate the use of any criteria in the fire service of assessing qualifications?

A. On promotions?

Q. On promotions.

A. Not that I'm aware of.

Q. Have you ever advised a department head that the criteria they use in assessing qualifications should be validated?

A. No.

* * *

[Page 439]

Q. Why wasn't the relative qualification proviso of paragraph two included in executive order 35-81 for the prototype affirmative action plan?

* * *

[Page 440]

A. At that time, paragraph two wasn't an issue.

* * *

[Page 441]

Q. Why wasn't that language provided or included in executive order 35-81 or the

[Page 442]

prototype affirmative action plan?

A. It wasn't necessary.

Q. Who determined that it wasn't necessary?

A. I don't know that anyone determined that it wasn't necessary. It just was not included.

* * *

[Page 458]

Q. Does the City decree provide that after a period of six years the decree will be dissolved?

[Page 459]

MR. ALEXANDER: Again, I object to the form. You can answer.

A. As I understand it, there is a provision where any party to the decree can move to have it dissolved.

Q. If someone stated that the decree would dissolve after six years, would that be an accurate statement?

A. It could be.

Q. Will the decree automatically dissolve after six years?

A. I don't know.

Q. Under what circumstances would a statement that the decree would dissolve after six years be an accurate statement?

A. Only that the decree basically is for a six-year term.

Q. Do you expect the decree to be dissolved after a six-year term?

A. I don't know.

Q. You don't have any judgment whatsoever about that?

A. No.

[Page 460]

Q. Is my statement correct, you have no judgment?

A. As to whether the decree will be dissolved after six years?

Q. Yes, sir.

* * *

[Page 472]

Q. Okay. Does the City decree provide that the City is permitted to promote a less qualified individual in preference to a better

[Page 473]

qualified individual to a Fire Lieutenant position?

MR. ALEXANDER: Object to the form. You can answer.

A. The City would be permitted to do so, yes.

Q. Which provisions of the decree so permit the City?

A. It would be the paragraphs five, six, seven, eight, nine.

Q. Can you be any more specific than that, sir?

A. Those paragraphs speak to goals for appointing qualified candidates.

Q. And is it your interpretation of the City decree and understanding of the City decree that those paragraphs permit the City to promote a less qualified individual in preference to a better qualified individual to a Fire Lieutenant position?

A. As long as the individual is qualified, they can be promoted under the decree.

* * *

[Page 475]

Q. Are Fire Lieutenant promotees traditionally drawn from the ranks of fire fighter?

A. Yes.

* * *

[Page 488]

Q. Okay. Are some promotional slots reserved for blacks?

[Page 489]

A. Only that limited number specifically referenced in the decree.

Q. Then it's your understanding that with respect to the Fire Captain position there was one Fire Captain position that was specifically reserved for a black?

A. Not a particular position, but a position once a qualified black was available.

Q. And no white had the opportunity to be considered for that particular position?

A. A vacant Captain position for which there was a qualified black available, then a white would not have been considered for that.

* * *

[Page 516]

Q. Does the City consider paragraph two in attempting to comply with the goal provisions of the City decree?

A. Not to my knowledge.

Q. You ignore it?

[Page 517]

A. It's never been at issue in filling jobs.

Q. It's ignored?

A. I wouldn't say it's ignored, it's not an issue in — has not been an issue in filling jobs.

Q. It has not been considered?

A. It's known, it's there.

Q. It's not implemented?

A. I don't know there's anything to implement about the paragraph two.

Q. It's a limitation on the goal provisions, isn't it?

MR. ALEXANDER: Object to the form. You can answer.

A. No.

* * *

[Page 524]

Q. (BY MR. FITZPATRICK:) The City of Birmingham acting through Chief Gallant with respect to Fire Lieutenant and Fire Captain promotions uses no test or any other type of

[Page 525]

selection procedure to determine or measure the relative qualifications of individuals certified for fire officer positions, is that correct?

A. Yes.

Q. And the City is unable to determine relative qualifications of candidates certified for fire officer positions, is that the City position?

MR. ALEXANDER: Object to form. Go ahead.

A. Is unable to?

Q. Yes.

A. I don't know that we've ever attempted to. I don't know if we would be able to do that or not, not having done it.

* * *

RESOLUTION
547-81

WHEREAS, there are presently pending in the United States District Court for the Northern District of Alabama three law suits commenced in 1974 and 1975 by the United States and others against the City of Birmingham and others; and,

WHEREAS, said law suits allege discriminatory practices by the City of Birmingham, Jefferson County and other County municipalities, and the County Personnel Board in employment opportunities afforded by all said entities to Blacks and women on account of race or gender in violation of Title VII, Civil Rights Act of 1964 and other Federal statutes; and,

WHEREAS, the City Attorney and other Counsel representing the City advise the Council that the interests of the City would best be served by the negotiation of a settlement of the cases with the United States and the private plaintiffs as opposed to continuing the litigation the result of which would, in great likelihood, subject the City to financial liabilities considerably in excess of the amounts for which the cases can be settled; and,

WHEREAS, accordingly, counsel for the City, having engaged in lengthy settlement negotiations with the United States and the private parties plaintiff, now advise the Council that the parties have reached substantial agreement on the content of a Consent Decree for submission to the Court for its approval; and,

WHEREAS, the City Attorney and other counsel representing the City are of the opinion and so advise the Mayor and Council that the proposed settlement is both fair and reasonable and the entry by the City into a Consent Decree embodying such settlement terms is far preferable to and eminently more advantageous for the City than the certain alternative of years of trial and appellate court proceedings the ultimate outcome of which will almost certainly obligate the City to the payment of sums substantially in excess of those proposed in settlement.

NOW, THEREFORE, BE IT RESOLVED by the Council of the City of Birmingham that the City Attorney, upon the concurrence of the Mayor, be and is hereby authorized for and on behalf of the City to enter into a Consent Decree in Civil Action cases numbered 75-P-0666-S, 74-Z-17-S, and 74-Z-12-S presently pending before the Honorable Sam C. Pointer, Jr. in the United States District Court for the Northern District of Alabama.

[U.S. EXHIBIT 3]

ORDINANCE NO. 77-88

AN ORDINANCE TO AMEND DIVISION 4 OF CHAPTER 2 OF THE GENERAL CODE OF THE CITY OF BIRMINGHAM 1964 ENTITLED "FAIR HIRING."

BE IT ORDAINED by the Council of the City of Birmingham that Division 4 of Chapter 2 of the General Code of the City of Birmingham, 1964 be hereby amended to read as follows:

(a) In order to assure fair hiring practices by the City of Birmingham, it is the policy of the City to recruit, hire, and promote to all job classifications in its various departments and agencies without regard to race, color, religion, sex, national origin, or physical handicap, except where sex is a bona fide occupational qualification, or the physical handicap is such as to interfere materially or render impossible reasonable performance in the job to be filled. The City of Birmingham is committed to developing and expanding positive programs which will assure the strengthening of this policy.

(b) Each head of a department or agency of the City of Birmingham shall be responsible for establishing and maintaining effective means of recruiting, hiring, training, transferring, retaining and promoting employees in order to prohibit any discriminatory practice, either intentional or inadvertent, with respect to race, color, religion, sex, national origin, or physical handicap.

(c) On or before January 1, 1978, and no later than January 1 of each of the succeeding five years and at such other times as may be required by the City Council of the City of Birmingham, the head of each department of the City shall submit to the Office of the Mayor, in writing, an affirmative action plan designed to increase the employment and promotions of blacks in the respective department, and to otherwise promote the policies of this section. A copy of said plan, with such modification as may be required by

the Mayor, shall be filed with the City Clerk within thirty (30) days of receipt thereof by the Mayor. The plan shall set forth the affirmative steps to be taken to increase the employment and upgrading of blacks, and any others with respect to whom there is any indication of the possibility of discrimination; it shall include specific goals for black manpower utilization and time tables for achievement of these goals. In determining the goals for black manpower utilization, the percentage of blacks in the work force in the City of Birmingham shall be a primary consideration. Further, the plan shall not be based on, or result in, the discharge of any employee of any department or agency of the City of Birmingham.

(d) A copy of the affirmative action plan for each department, when approved by the Mayor, shall be posted in a conspicuous and prominent place in the main office of each department of the City of Birmingham and at the office of the Jefferson County Personnel Board, and a copy thereof shall be open to reasonable public inspection in the office of the Mayor during regular business hours.

(e) Each department of the City of Birmingham shall maintain records indicating the race and sex of each person employed in each job classification in the department, and the job classifications in which handicapped persons are employed. Such records shall be made available for public inspection upon request at reasonable times. These records shall be embodied in semi-annual and annual evaluation reports of each department's affirmative action plan as of June 30 and December 31 of each year, to be submitted by each department head to the Mayor and the City Council on or before July 31 and January 31 of each calendar year. This report shall also include a review of the department's progress in achieving the specific goals of the department's affirmative action plan, noting those goals which were achieved and those not yet achieved, the reason for any failure to achieve goals, and the remedial action being taken to overcome any such failure. Copies of these evaluation reports shall be maintained for a period of five years in the Mayor's Office, where they shall be

subject to reasonable public inspection during regular office hours.

(f) With regard to the formulation and execution of the affirmative action plans and programs provided for herein, the Mayor shall promulgate, and modify from time to time, such rules and regulations as he shall deem necessary to carry out the policies of this section; provided, however, that such rules and regulations shall include the following minimum provisions together with such other provisions as may from time to time be required.

(1) Whenever the percentage of classified City employees who are black is less than the percentage of black employees in the labor force in the City as defined in *Manpower Information for Affirmative Action Programs*, published by the Alabama Department of Industrial Relations, for July 1, 1976 each department head shall, as vacancies occur, give first preference to any blacks certified by the Jefferson County Personnel Board as being qualified to fill such vacancies until such time as the above stated goal has been reached.

(2) So long as any department has failed to achieve the goals established in its approved plan, the rejection of any such certified black applicant shall be required by such rules and regulations to be justified in writing, and a copy of such written rejection justification shall be maintained in a separate file in the Office of the Mayor, and subject to reasonable public inspection during regular office hours for a period of not less than two years.

(3) Each department of the City shall, separately or in conjunction with other departments, have a positive recruiting program in cooperation with community organizations, area high schools, colleges and universities, and with local business and industry to increase the utilization of persons protected from discrimination by this section.

(4) A complaint procedure which shall be available to any applicant or employee who has reason to

believe that he or she has been discriminated against in violation of the provisions of this section which procedure shall provide, on request, a fair hearing, a written decision, and a right of appeal to the Mayor, provided further that no provision of this section or rules or regulations issued hereunder shall require the placing of any person in any job for which he or she is not qualified by reason of ability, training or experience.

(g) So much of any ordinance heretofore adopted as is inconsistent with the provisions hereof is hereby repealed.

[Adopted by the Council of the City of Birmingham
at its meeting held on May 3, 1977 and
approved by the Mayor on May 9, 1977.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

STIPULATION

IT IS STIPULATED AND AGREED, by and between the parties, through their respective counsel, that the deposition of **RICHARD ARRINGTON, JR.** may be taken before Gary N. Morgan, Registered Professional Reporter, Commissioner and Notary Public, State at Large, at 1400 Park Place Tower, Birmingham, Alabama, on the 16th day of September, 1985, commencing at 9:18 a.m.

* * *

[Page 66]

Q. Mayor, what was your involvement, if any, in the negotiations of the City decree?

A. Well, I had no direct involvement. My — it was negotiated by my attorneys, the attorneys for the City of Birmingham. They advised me and made recommendations to me which

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I passed judgment on.

Q. Do you recall having seen any proposed drafts of the City decree prior to the final decree that was ultimately signed and entered by the court?

[PX 403 & DX 2236]

A. I don't recall seeing drafts. I do recall having discussions with the attorneys regarding the contents or proposed contents of the consent decree settlement.

Q. Did you ever attend any of the negotiations sessions between the City and the Department of Justice concerning the consent decree?

A. No.

Q. Did you ever make any recommendations concerning specific provisions that should be included or excluded in the City decree?

A. I don't recall making any.

Q. Do you recall ever making any written comments concerning the City decree prior to its being signed?

A. I don't recall any.

Q. All right. Did you have any

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discussions with any of the lawyers for the Department of Justice concerning the City decree prior to its being signed?

A. No, I did not.

Q. What was the approval process that was required before Mr. Baker could sign the City decree on behalf of the City?

A. It was necessary for the Birmingham City Council to authorize him to do so.

Q. Was your approval as Mayor also required?

A. As a matter of law or legal procedure, it was not required, but as — I certainly had sat in on the meeting with the council and the attorneys when the decree or the proposed decree was explained.

* * *

[Page 81]

attached to yours. As Mayor, did you approve of the City's signing this consent decree?

A. Are you asking me did I take some specific action to approve it or did I — was I in favor of it?

Q. Were you in favor of it?

[Page 82]

A. Yes.

Q. Did you review the decree prior to the City Council's authorizing the City to enter into the decree?

A. I reviewed it with my attorneys. I do not know if I read through the entire decree, but I had the attorneys go over the terms of the decree and explain it to me.

* * *

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Q. At the time those suits were filed, did you have any opinion as to whether or not there was any merit to those complaints?

A. Could you sort of refresh my memory on what the complaints are so that we are on the same wave length here?

Q. Okay. Sure. I'll represent to you that in 1974 there were two suits filed against the City by private entities or individuals and then in 1975 a third suit filed by the United States Government against the City and others, and when a suit is filed, one files a complaint or a charge or a claim, written claim making certain allegations. Do you understand tha? [sic]

A. I understand that, yes.

Q. Okay. After the filing of these three suits, did you have any opinion as to the merits of the charges in those three suits against the City?

A. I'm sorry. You didn't understand my question.

[Page 290]

MR. ALEXANDER: He wants to know what the charges were.

A. The charges —

Q. Oh, charges of racial discrimination against the City in its employment practices.

MR. WORTHEN: Race and sex.

Q. Race and sex?

A. Did I have a opinion as to that?

Q. Yes.

A. Yes, I had an opinion as to that.

Q. What was that, sir?

A. That the City practiced race and probably sex discrimination, but racial discrimination rather flagrantly.

Q. That the City was guilty, so to speak?

A. That was my opinion. I wouldn't use the term guilty as a legal court thing, but the City had —

Q. In a layman's term.

A. Okay. Yes.

Q. Okay. Did you express that opinion to any of your fellow council members?

A. Not as it related to any specific

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complaint. However, I expressed the opinion that the City was discriminating in its employment practices in council meetings when discussions came up and by other actions I took such as trying to introduce ordinances and perhaps even raising — by questions I raised and debates I participated in.

Q. Who does the City Attorney represent, the Mayor or the council of the City or all of the above.

A. All of the above.

Q. If the City Attorney in response to a suit against the City takes a position or files an answer to the suit, does the City Attorney review the suit with the council before taking that position or filing that answer?

A. He may or may not. The City Attorney like all other department heads are under the supervision of the Mayor. The council has no authority under the Mayor/Council Act to instruct department heads or City employees.

Q. As I understand it, unless the council affirmatively speaks to its position on

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a given issue, the Mayor instructs the City Attorney on what the position of the City shall be in litigation?

A. That could be the case. It just depends on what — what the case is.

* * *

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[Q. . . . Why was the council consulted prior to the City's entering into the consent decree?

A. Because as elected officials, I number one wanted the council to be consulted as elected representatives. Secondly, in authorizing payments, appropriations of funds, the council is the body that has to appropriate funds. Those are two of the basic reasons.

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Q. But the main reason that council approval was sought because you needed their authorization for the funds?

A. No, I — that is just one of the reasons. They were also parties to this by virtue of the fact that they were council members. I saw them as, you know, parties to it as official representatives of the City, governing body — in a sense when the City was sued, the governing body.

Q. The individual council members in their official capacities were not named, were they?

A. I do not recall.

Q. Assume for me, please, that the City had reached an understanding with the United States and the Martin plaintiffs and the third entity which signed the decree, the Ensley Branch, but instead of providing for two hundred and sixty-five thousand dollars in back pay — rather than monetary relief, the decree instead provided for the payment of a thousand dollars; you have authority to pay out a thousand dollars

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without council approval, do you not?

A. Yes.

Q. Assume for me that the consent decree was negotiated. Would you have had authority to authorize the settlement based on the injunctive relief in the consent decree plus the payment of, say, a thousand dollars, something within your limit?

MR. ALEXANDER: Object to the form of the question. Answer if you can.

A. I don't know. I would have — I would have to consult the attorneys on it. All I know is that I was advised, consulted the City Attorney — I mean City Council and all.

Q. What I'm trying to find out is if you had the authority to commit the City to injunctary [sic] relief without seeking council approval in the settlement of litigation?

A. No.

Q. And you may or may not know the answer.

A. I don't know the answer.

Q. Was the main concern of the council

[Page 300]

at the meeting in your office prior to the City's entering into the consent decree the amount of money that would be committed to the settlement?

A. I really don't recall. I thought it was such a modest amount. I thought it was the best business deal we had ever struck, but I just don't recall.

Q. Why do you think it was the best business deal you had ever struck?

A. I just thought paying two hundred and sixty thousand dollars for a City that had a history of discrimination against people was a very modest price to pay.

Q. And in addition, you gained tools to upgrade blacks and women in the work force?

A. In the consent decree?

Q. Yes, sir.

A. Yes, we did.

Q. So you believe you not only got off with a low but also gained tools to achieve certain goals that you wanted to achieve in office?

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MR. ALEXANDER: Object to the form. You can answer.

A. No, that's not exactly correct, but at least a move toward a goal that I would like to see this city achieve.

Q. And without the decree, you don't believe you would have been able to attain those goals?

A. Absolutely not.

Q. So you certainly didn't mind committing the City to be the subject of that injunction, did you?

MR. ALEXANDER: Object to the form. You can answer.

A. I'm sorry. I get a little confused. Subject of the injunction —

Q. Is the City of —

A. — to enjoin the City from —

Q. Enjoin the City to the relief of the decree?

A. I agree with that. I did not object to it in any event if that is the question.

Q. In approving the decree, was it the

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council's position that it did not want an admission of guilt by the City?

A. I don't recall that ever being a position that was expressed by the council. I just think that's been a position that all of us as elected officials have generally taken in matters of litigation, and that is more or less standard even in ordinances which I probably sponsored myself.

Q. We'll settle, but we are not going to admit that we're liable for anything?

A. I don't know. There's some legal posturing that I don't fully understand.

Q. Has the City Council of Birmingham ever made a finding of past discrimination by the City in its employment practices?

MR. ALEXANDER: Object to the form. You can answer.

MR. FITZPATRICK: Which aspect of the form if I can —

MR. ALEXANDER: Finding of past discrimination, I think those are legal phases [sic] of art which you are directing to a lay witness.

[Page 303]

I don't think the question is proper. I'm not certain he understands it. If he does, he can answer.

Q. Do you understand the term "finding of past discrimination"?

A. I think I understand the question, but I don't know the answer to it except to say I do not know.

Q. You're not aware of any findings of past discrimination made by the City Council with respect to the past employment practices of this City?

A. As a body, no.

Q. Okay. How about by individual council members?

A. Well, I think my — some of my studies and some of my findings would at least satisfy me and perhaps some other council that such practices did exist, but they were never formalized, formally adopted by the council.

Q. The council has never formally studied them and adopted them?

[Page 304]

A. They never adopted them anyway.

Q. Now, in the matter of the — I don't quite know what to call it — the minority contractors ordinance, is that a correct term?

A. I know what you're talking about.

Q. Okay. What's the correct term?

A. That's — that's it, yeah.

Q. In the matter of the minority — when the council adopted the minority contractors ordinance, did it attempt to make findings of past discrimination at that time? With respect to the City's allocation of business contracts?

A. I do not know. It seems to me that was done during David Vann's administration, and I don't know what findings were made at that time. I don't recall any.

Q. Other than the ordinances of the City Council and the minutes of the City Council, are there any other records which reflect the conduct of affairs of the council or decisions of the council or findings of the council?

A. Those are the only records I would know of.

[Page 305]

Q. So findings of discrimination — of the past discrimination with respect to employment practices are not reflected in any ordinance or the minutes of the council, then they are not recorded anywhere, to your knowledge?

A. Aside from court records where I think the findings were made, I don't think there are any.

* * *

[Page 306]

Q. Are you familiar with the two trials that were presented to Judge Pointer in the course of the Jefferson County — the United States v. Jefferson County litigation?

A. I am not sure. Can you be a bit more specific? I have to have a little bit more.

Q. I'll try if counsel will bear with me. We talked earlier about three discrimination suits that were filed against the City in '74 and '75. And if we may, can we call that the original litigation?

A. All right.

Q. And are you aware that those three cases were consolidated by Judge Pointer in 1975 or '76?

[Page 307]

A. Yes.

Q. Okay. So we'll just call those three cases the three original — the original litigation. Are you aware that there were — that two trials were conducted during the course of the original litigation?

A. No, I'm aware that there was a hearing and I suppose maybe a trial where Judge Pointer ruled on the validity of some examinations.

Q. Okay. That was the first trial?

A. And then I am aware that there was apparently a hearing which was — had gone at the time — prior to the time the consent decree was entered into but which may have been aborted or stopped because of the consent decree.

Q. I believe you testified that you are aware of the first trial in which the validity of certain Personnel Board examinations was tried?

A. I do remember that one tried, yes.

Q. And did that trial involve the validity of certain administrations of the

[Page 308]

police officer and fire fighter exam?

A. I don't know.

Q. Do you know if that trial involved just the police officer and fire fighter exam?

A. I don't know.

Q. Do you know what findings Judge Pointer made after that trial, the first trial?

A. I generally know that there was a requirement from the Judge that dealt with validation, a requirement of validation for some examinations that were being used by the Personnel Board.

Q. What is your understanding of the term "validation"?

A. To make valid, prove the relevance of.

Q. Prove the relevance of the examination?

A. Yes, prove the purpose for which it purports to serve.

Q. In the case of police officer exam to make the exam correspond to the goal of trying to measure one's capabilities of being a police officer?

[Page 309]

A. That's — would be my interpretation.

Q. And it's your understanding that Judge Pointer required the Personnel Board to validate its exam?

A. That's my general impression, yes.

Q. Do you know what findings he made with respect to the exams administered by the Personnel Board?

A. I don't recall a specific finding. I sometime ago read an order from the Judge relating to that matter and one which I think are related to a second hearing.

Q. We'll come to that in a moment, sir. What findings did the Judge make after the first trial about the employment practices of the City of Birmingham?

A. I don't recall specifically the findings. I do generally recall that there were some requirements about certifications that must be made in which the Judge set forth certain requirements as related to certification of blacks, whites and things of that — of that sort.

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Q. The Judge required the Personnel Board to meet certain certification requirements?

A. That's my recollection.

Q. Did he require anything of the City?

A. I don't — I don't recall whether he did or not.

Q. Did he make any findings of intentional discrimination by the Personnel Board?

A. At what time?

Q. After the first trial.

MR. ALEXANDER: Object to the form. You can answer.

A. I don't know.

Q. Do you know what I mean by intentional discrimination?

A. I think I do, yes.

Q. Okay. What is that? What is your definition of the term?

A. Discriminating on purpose.

Q. Purposeful discrimination?

A. Yes, yes.

Q. Do you know if he made any findings

[Page 311]

of purposeful discrimination?

A. I don't know. It's been some time since I've read that order.

Q. Do you know if he determined that the Personnel Board had not engaged in purposeful discrimination?

A. I don't know. What sticks out in my mind is some of the statements — or a statement in the Judge's order in which he strongly implies if he does not state that the City — the evidence indicated that the City had liabilities in that area. Whether that was following the first one or the second one, I don't know. Possibly it was the second one, because I think he was addressing the matter that we were about to enter into the consent decree, that the parties had decided to have an out-of-court settlement.

Q. Have we covered the extent of your knowledge about the findings the Judge made after the first trial?

A. At least my recollection at this time, yes, without reviewing the document again, yes.

* * *

[Page 314]

Q. Yeah. Are you aware of any court records or court decision where a court has found that the City of Birmingham has engaged in intentional discrimination against blacks?

A. No, I'm not aware of it.

Q. Okay. Are you aware of any court records or court decisions or determinations

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where any court has found that the City of Birmingham has engaged in any discrimination against blacks?

A. No, I'm not aware of it.

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Appeal #81-7761

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JEFFERSON COUNTY, *et al.*, *Defendants-Appellees.*	CIVIL ACTION NO. CV 75-P-0666-S
JOHN W. MARTIN, *et al.*, *Plaintiffs-Appellees,* v. CITY OF BIRMINGHAM, *et al.*, *Defendants-Appellees.*	CIVIL ACTION NO. CV 74-Z-17-S
ENSLEY BRANCH OF THE N.A.A.C.P., *et al.*, *Plaintiffs-Appellees,* v. GEORGE SEIBELS, *et al.*, *Defendants-Appellees.* BIRMINGHAM FIREFIGHTERS ASSOCIATION 117, *et al.*, *Proposed Intervenors, Appellants.*	CIVIL ACTION NO. CV 74-Z-12-S

On Appeal from U.S. District Court for the Northern District of Alabama, Southern Division

BRIEF OF DEFENDANT-APPELLEE
CITY OF BIRMINGHAM

[PX _____]

James K. Baker
James P. Alexander
Eldridge D. Lacy

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* * *

STATEMENT OF ISSUES ON APPEAL

1. Whether the district court abused its discretion in denying a labor organization's motion to intervene to challenge consent decrees terminating seven years of fair employment litigation where the labor organization had no contractual relationship with the employer.

2. Whether appellants have standing to challenge consent decree provisions governing hiring and employment requirements when such provisions do not affect appellants.

3. Whether the district court abused its discretion in approving the consent decrees as (i) fair, adequate, and reasonable, and neither (ii) illegal or unconstitutional.

STATEMENT OF THE CASE

For the convenience of the Court, the City of Birmingham adopts by reference the statement of the case in the Department of Justice brief.

SUMMARY OF THE ARGUMENT

Appellants' intervention attempt is untimely since the Firefighters failed to seek to intervene until this litigation had been pending for seven years. Under the *Stallworth v. Monsanto Co.*, guidelines it is clear that the trial court did not abuse its discretion in denying intervention. Appellants delayed many years after they knew, or should have known, of an interest in the lawsuit, placing a heavy burden on the union to jus-

tify intervention. Moreover, the exsisting [sic] parties to the litigation will suffer significant prejudice if intervention is allowed; in contrast, the Firefighters have made no showing of a judically-cognizable [sic] interest, much less prejudice.

With respect to hiring goals and requirements, the union lacks standing either in its own right or as the representative of its members. As the union failed to demonstrate it was adversely affected, it lacks standing in its own right. Likewise, the Firefighters' failure to show a sufficient and direct injury to its members prevents it from obtaining standing as the representative of its members.

A critical fact, with respect to both the union's request for intervention and the underlying merits, is the absence of a collective bargaining relationship between Birmingham and the Firefighters. As appellants concede: "In Alabama, public employee[s] do not have collective bargaining rights." [Appellants' Br. at 37]. Thus, the right of these appellants to participate as parties in this litigation is tenuous.

The limited goals in the Birmingham decree represent a permissible remedy. In examining this comprehensive settlement of these actions this Court should not be unmindful of the circumstances surrounding settlement. A careful and experienced district judge found:

> Employment statistics for Birmingham's police and fire departments as of July 21, 1981, certainly lend support to the claim made in this litigation against the City--that, notwithstanding this Court's directions in 1977 with respect to certifications by the Personnel Board for the entry-level police officer and firefighters positions and despite the City's adoption of "fair hiring ordinance" and of affirmative action plans, the effects of past discrimination against blacks persist. . . . In the fire department, 42 of the 453 firefighters are black and none of the 140 lieutenants, captains, and battalion chiefs are black.

(R.I., 317)

The challenged promotional and hiring goals fairly address this problem. The promotional goals in the decree are supported by the fact that discriminatory tests largely excluded blacks from

the fire department for a period of time. The goals are temporary and do not altogether exclude whites even in the temporary period during which they operate. Significantly, Birmingham is not required to promote any unqualified candidate under the precise terms of its decree. Therefore, the Firefighters have failed to demonstrate that the trial judge abused his discretion in approving the consent decrees.

STATEMENT OF JURISDICTION

Jurisdiction exists, *inter alia,* under 42 U.S.C. 2000e et seq.

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE FIREFIGHTERS' MOTION TO INTERVENE

Plaintiffs contend that the trial court abused its discretion under F.R.Civ.P. 24 when it denied the Firefighters' Motion to Intervene as untimely. The linchpin of appellants' argument is their characterization of their request for intervention as one "of right" under F.R.Civ.P. 24(a).

A. Intervention Under Sections (a) and (b) of Rule 24

In the district court, appellants failed to characterize their proposed intervention as "permissive" or as of "right." Judge Pointer in his order simply stated that the motion was "clearly untimely" (R.I., 320). Retrospectively, however, appellants claim they were entitled to intervene under F.R. Civ. P. 24(a)(2). (Appellants' Br. at pp. 8, 12).

Several courts have enunciated a policy against private intervention under Rule 24(a)(2) in government enforcement litigation brought under Section 707 of Title VII. *U.S. v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975); *EEOC v. United Air Lines*, 515 F.2d 946 (7th Cir. 1975); *U.S. v. San Diego County*, 20 FEP Cases 1425 (S.D. Cal. 1977). [1]

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1 Although attorneys for the Department of Justice have taken the lead role in this litigation, Judge Pointer's August 18, 1981 Order and Judgment also covered two private cases consolidated for trial with 75-P-0666-S; *Ensley Branch of N.A.A.C.P., et al., v. Seibels, et al.*, CA 74-2-12-J; *John W. Martin, et al., v. City of Birmingham, et al.*, CA 74-2-17-S.

These courts reason that private intervention is inappropriate in Section 707 pattern and practice suits which are brought to remedy widely based systemic discrimination. In *U.S. v. Allegheny-Ludlum, supra*, the Fifth Circuit upheld the trial court's denial of an application to intervene by the National Organization for Women ("NOW") made after a consent decree was entered in an action brought against nine steel companies alleging pattern and practice employment discrimination. Analyzing NOW's motion to intervene under Rule 24(a)(2), the Court of Appeals held that, although NOW obviously claimed an interest in the subject matter of the action, it failed to satisfy the other two prongs of the test for non-statutory intervention of right. In so ruling, the Fifth Circuit distinguished NOW's position from that of the union in *EEOC v. American Tel. & Tel. Co.*, 365 F. Supp. 1105, *aff'd in part, appeals dismissed in part*, 506 F.2d 735 (3rd Cir. 1974), *consent decrees upheld* 556 F.2d 167 (3rd Cir. 1977) stating, "At any rate, we think a labor union *which is a party to collective bargaining agreement* represents a far stronger case for intervention than does an organization such as NOW." *U.S. v. Allegheny-Ludlum, supra* at p. 845 (emphasis added). The court distinguished NOW from a labor union administering a collective bargaining agreement stating:

> A labor union is elected to represent in collective bargaining the employees who depend on the company for their jobs and livelihood. When the company, as in *American Tel. & Tel.*, enters into a settlement with the government in an effort to resolve complaints of alleged employment discrimination, the union derivatively acquires a mandatory duty to negotiate alternatives to the provisions - *e.g.*, those relating to seniority or as in the Bell case pregnancy leave - of the existing collective bargaining contract. As the settlement contains features the legality or propriety of which is questionable, then the union may have a definite, cognizable interest qua union in contesting these features. Cf. Kilberg, *Current Civil Rights Problems in Collective Bargaining Process: The Bethlehem and AT&T Experiences*, 27 Vand. L. Rev. 81, 101, 106 (1974). Furthermore, the union's ability to protect its interest may well be impaired or impeded if it is not allowed to intervene in the settlement formalization proceedings. At the very least, it would be anomalous to assume in such cases that the employees' bargaining representative's interest is adequately served by the government or the employer.

Id.

Because of limitations dictated by Alabama law, discussed *infra*, the Firefighters posture is analogous to NOW.

Similarly, in *Stallworth v. Monsanto Co.*, 558 F.2d 257 (5th Cir. 1977), an employment discrimination suit by blacks in which non-union white employees sought to intervene to contest the provisions of a consent order, the Fifth Circuit stated, "[S]hould the district court determine that no contract exists between the appellants and Monsanto, their interest in the case would not meet the challenge posted by *Donaldson*, and they would not be entitled to intervene as of right." *Id.* at p. 269. Thus, if no contractual relationship exists between the employees and the employer, the employees are not entitled to intervene as of right. Therefore, the question of whether the non-union white employees should be granted leave to intervene was addressed under permissive intervention standards.

These considerations are equally applicable to this case. Appellants acknowledge that Alabama public employees do not have collective bargaining rights. The Firefighters have no legitimate interest adversely affected because none of the goals proposed in the consent decree infringe upon contractually-secured employment rights. Thus, the Firefighters do not enjoy an unconditional right to intervene under F.R. Civ. P. 24(a)(2). Appellants' intervention status is correctly analyzed under the standards for permissive invention.

Even though the timeliness requirement applies to both forms of intervention a different standard is used to determine what is "timely," depending on the type of intervention sought. Not surprisingly, permissive intervention timeliness questions are judged by a more stringent standard. *E.g.*,*McDonald v. E.J. Lavino*, 430 F.2d 1065, 1073 (5th Cir. 1971), quoting Barron & Holtzoff (Wright ed.); *Diaz v. Southern Drilling Corp*, 427 F.2d 1118, 1126 (5th Cir. 1970). Thus, appellants here

face a difficult task in proving their motion to intervene was timely under F.R. Civ. P. 24(b).

B. Appellants' Motion to Intervene Is Not Timely

Rule 24 fails to define "timely," and the Advisory Committee Note furnishes no clarification. However, as recognized by the Supreme Court in *NAACP v. New York*, 413 U.S. 345 (1973):

> Whether intervention be claimed of right or as permissive, it is at once apparent from the initial words of both Rule 24(a) and Rule 24(b), that the application must be "timely." If it is untimely, intervention must be denied. Thus, the court where the action is pending must first be satisfied as to timeliness. Although the point to which this suit has progressed is one factor in determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review.

NAACP v. New York, supra at pp. 365-66 (1973). *Accord, United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395-96 (1977).

Thus, "Timeliness is not a word of exactitude or of precisely measureable dimensions." *McDonald v. E.J. Lavino Co., supra.* Moreover, applying *NAACP v. New York*, timeliness is not limited to chronological considerations but is determined from all the circumstances. *U.S. v. U.S. Steel Corp*, 548 F.2d 1232, 1235 (5th Cir. 1977); *Stallworth v. Monsanto Co., supra.*

The Fifth Circuit in *Stallworth* formulated specific guidelines to inform trial courts in the exercise of their discretion. Four factors must be considered in passing on the timeliness of a petition for leave to intervene:

> (1) The length of time during which the would-be intervenor actually knew or should have known of this interest in the case before he petitioned for leave to intervene. *United Airlines, Inc. v. McDonald, supra*; *SEC v. Tipco, Inc.*, 554 F.2d 710, 711 (5th Cir. 1977); *McDonald v. E.J. Lavino Co., supra*; *Diaz v. Southern Drilling Corp., supra.*
>
> (2) The extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case. *United Airlines, Inc. v. McDonald, supra*; *McDonald v. E.J. Lavino Co., supra*; *Diaz v. Southern Drilling Corp., supra.*
>
> (3) The extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied. *Moten v. Bricklayers International Union*, 543 F.2d at 228 (D.C. Cir. 1976); *see, McDonald v. E.J. Lavino, supra*; *Diaz v. Southern Drilling Corp., supra.*
>
> (4) The existance of unusual circumstances militating either for or against a determination that the application is timely. *NAACP v. New York, supra.*

Appellants argue that intervention was not untimely in that they acted diligently to intervene once they became aware they might be aversely affected. (Appellants' Br. at p. 14). However, application of the *Stallworth* criteria demonstrates that Judge Pointer did not abuse his discretion in holding that appellants' motion to intervene was not timely.

(1) The length of time during which the would-be intervenor actually knew or should have known of his interest in the case before he petitioned for leave to intervene.

With respect to the first factor Judge Pointer noted that at the time of the motion, this litigation had been pending for over five years and had been vigorously contested by the existing parties through two trials and one appeal. (R.I., 321).

Moreover, long before the contents of the proposed consent decrees were disclosed, appellants must have known their interests might be affected. Whether the litigation terminated in settlement or decision, it was apparent that in fashioning a remedy, the interests of non-minority employees seeking the same jobs might be affected. Numerous courts have held intervention untimely under similar circumstances. See, *Commonwealth of Pa. v. Rizzo*, 530 F.2d 501 (3d Cir. 1976); *Culbreath v. Dukakis*, 630 F.2d 15 (1st Cir. 1980); *Stallworth v. Monsan-*

to, supra; *Dennison v. City of Los Angeles*, 658 F.2d 694 (9th Cir. 1981); *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657 (9th Cir. 1978); *EEOC v. ET & WNC Transp. Co.*, 81 F.R.D. 371 (W.D. Tenn. 1978); *Firebird Society, Inc. v. New Haven Board of Fire Commissioners*, 66 F.R.D. 457 (D. Conn. 1975), *aff'd* 515 F.2d 504, *cert. den.* 423 U.S. 867 (1975).

In *Commonwealth of Pa. v. Rizzo, supra*, the Third Circuit Court of Appeals held that the trial court did not abuse its discretion when it ruled untimely the attempted F.R. Civ. P. 24(a)(2) intervention by the Fire Officers Union and white firefighters in an action challenging employment practices when the motion to intervene was filed after the entry of a final order. In *Rizzo*, as in this case, the white firefighters argued that, until shortly before they moved to intervene, they reasonably believed that their interests were being protected. Moreover, they claimed that their interests were not even implicated because they had understood that promotion practices were not at issue. In response to these arguments the Third Circuit noted that the white firefighters could not reasonably claim that they were unaware of the action and that the nature of the remedies sought by plaintiffs should have prompted intervention. Noting that the complaint, by its terms, addressed the whole spectrum of employment practices in the fire department and that extensive publicity about the litigation gave early notice of its potential impact on the firefighters rights, the Third Circuit found no abuse of discretion in the district court's denial of intervention.

Likewise, the First Circuit Court of Appeals in *Culbreath v. Dukakis, supra*, upheld the district court's denial of intervention. With respect to the length of time the intervenor knew or should have known of his interest before petitioning to intervene, the First Circuit held there was no excuse for the employee union's failure to intervene earlier in an employment discrimination action against the state nearly four years after they should have known of the initiation of the action and shortly before the parties to the action agreed on a consent decree containing racial preference mechanisms. As the court stated,

> While knowledge of the suit is not necessarily knowledge of one's interest, in this instance, the existence of interest

> was obvious. See, *Stallworth v. Monsanto Co.*, 558 F.2d at 264, and the only lack related to its extent, a matter of degree, not of kind. The complaint, the newspaper stories and the published court decisions all stated that the purpose of the suit was to force each agency to adopt hiring and promotion policies that would result in employed minorities and percentages approximately equal to their proportion of the population of the City of Boston. It should have been apparent to the unions that some non-minorities would be passed over in favor of minorities to achieve this goal.

Culbreath v. Dukakis, supra at p. 1592.

Thus, the First Circuit held that the trial judge had ample grounds for finding that the union should have known of their interest in the suit long before they filed their motion to intervene.

In *Dennison v. City of Los Angeles, supra*, the appellate court rejected the union's contention that it was not notified of the employees' action until shortly before the fairness hearing noting that the union had sufficient opportunity to intervene in the action prior to entry of the consent decree. Moreover, the court held that the union was provided with an opportunity to present to the trial court its view of the adverse impact on the decree of non-minority employees at the fairness hearing.

Finally, the Ninth Circuit in *Alaniz v. Tillie Lewis Foods, supra*, upheld the trial judge's denial of intervention under Rule 24(a) where the crux of the putative intervenor's argument was that they did not know that the settlement decree would be to their detriment. The court reasoned that surely the appellants knew the risk; therefore, they should have joined the negotiation before the suit was settled.

Contrary to the appellants' argument that they were not aware that "relief which could possibly be granted under Title VII could adversely affect them in greater degrees in the event the existing defendant decided to settle the case" (Appellants' Br. at p. 17), these cases establish that where there is no allegation that the litigation or its progress was fraudulently concealed

from potential intervenors, the nature of the relief sought should have alerted potential intervenors to the necessity for intervention. The record does not suggest fraudulent concealment.

Likewise, appellants' claim, even if correct, that their intervention was timely because they relied on the Personnel Board to defend the action and resist imposition of hiring and promotional goals (Appellants' Br. at p. 13) does not succeed. As noted by the Fifth Circuit in *U.S. v. U.S. Steel, supra* at pp. 1235-36:

> [T]he Union's reliance was misplaced . . . Even were we to accept the union's argument as explaining the delay, prejudice to the parties would still persist because, as the union concedes, it was aware of the consent decree from the first yet slept on its rights and took no action to assert its interest.

A similar response was made by the Third Circuit in *Commonwealth of Pa. v. Rizzo, supra*, to the union and white firefighters assertion that they were "lulled into non-action" by misrepresentations that the city would virgorously defend the case. The Third Circuit noted that the burden of establishing inadequate representation was on the proposed intervenor.[2] Thus, the court rejected the union's contention that intervention was timely and that any delay should be excused due to their reliance on misrepresentations concerning the adequacy and vigor of representation by the City of Philadelphia. *See also, EEOC v. Westinghouse Elec. Corp.*, ___ F.2d ___, 28 FEP Cases 815 (8th Cir. 1982) (per curiam) (burden on intervenor to demonstrate lack of knowledge). Similarly, intervention by the Firefighters in this case is untimely and may not be excused because of their assertion that they were allegedly relying on the original defendants to defend their interest. Thus, on this basis the courts have held intervention untimely where it occurs in such latter stages of litigation.

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2 Furthermore, the court held that a presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee. *Commonwealth v. Rizzo, supra*, at p. 283. *See also*, 7A C. Wright & A. Miller, Federal Practice and Procedure § 1209 at 528-29 (1982); *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689 (196) (dictum).

Simply put, the Firefighters made an election to defend their interests by proxy. They cannot now complain because the result displeases them. Having sat on their hands for seven years, the Firefighters now have no right to contest the outcome of the fray.

(2) The extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenors' failure to apply.

It should be initially noted that consideration of the second factor is only relevant to permissive intervention under Section (b) of Rule 24.[3]

Under *Stallworth v. Monsanto Co., supra*, the next relevant inquiry is "how much prejudice would result from the would-be intervenor's failure to request intervention as soon as he knew or should have known of his interest in the case." *Id.* at p. 267. As to the prejudice which the resultant delay might cause to other parties, the Third Circuit in *Commonwealth v. Rizzo, supra*, adopted the district court's opinion:

> To allow intervention at this stage of the case would result in serious prejudice to the rights of the plaintiffs and the Philadelphia Fire Department. Extensive discovery has been undertaken and completed, all critical issues have been resolved, and a final Order has been entered. The interest in basic fairness to the parties and expeditious administration of justice mandates the denial of the motion to intervene. *Id.* at p. 284.

Likewise, to permit intervention would result in further unfair and unjustified delays and possible denial of the relief which all the parties agreed to in the settlement agreement. *Firebird Society, Inc. v. New Haven Board of Fire Commissioners, supra; Culbreath v. Dukakis, supra; Commonwealth v. Rizzo,*

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3 As noted by the court in *Stallworth*, since a similar provision is not included in Section (a) of the Rule providing for intervention of right, it is apparent that prejudice to the existing parties other than that caused by the would-be intervenor's failure to act promptly is not a factor meant to be considered where intervention is of right.

supra; *Alaniz v. Tillie Lewis Foods*, *supra*; *U.S. v. Allegheny-Ludlum Industries*, *supra*.

In this case, the Firefighters would compel Birmingham to continue to litigate a suit it has negotiated to conclusion. The parties here have waited approximately seven years since commencing suit for resolution of the issues. Likewise, the parties have bargained in good faith in the belief that ultimately they could economically and fairly resolve this potentially divisive lawsuit. However, belated intervention for the purpose of challenging the consent decree will jeopardize months of difficult negotiation, and postpone full implementation. Indeed, the Firefighters' objection, if followed through to its logical conclusion, would dictate that the City of Birmingham either confess judgment, abdicating any hope of limiting the financial impact and fashioning injunctive relief, or litigate to a conclusion, incurring staggering legal expenses with the unhappy prospect of paying both its own lawyers and the lawyers for potential prevailing private plaintiffs. Neither the Constitution nor any law requires such a dilemma. Indeed, the federal policy of encouraging voluntary resolution of employment discrimination litigation suggests that such a dilemma is not intended.

(3) Prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied.

With respect to the third factor, the essence of this requirement is "whether the union received such notice and opportunity to be heard as to satisfy the due process rights to be accorded persons so situated." *Culbreath v. Dukakis*, *supra* at p. 1593. See generally, *Hansberry v. Lee*, 311 U.S. 32, 43 (1940); *NAACP v. New York*, *supra*. Here the district court noted that it had reviewed the provisions of the proposed settlements to which objections had been raised and found the settlement to represent a fair, adequate and reasonable compromise of the issues between the parties. (R.J., 320). Moreover, the court stated that it not only permitted the Firefighters to be heard in opposition to the settlement but that it fully considered their objections. (R.I., 321). Thus, the prejudice to the intervenors from denial of intervention is minimal.

Likewise, despite appellants' contentions to the contrary (Appellants' Br. at p. 20) they were not denied an opportunity to be heard. Indeed, the Firefighters were allowed to present their arguments in opposition to the consent decree and based on its analysis of all the evidence, including the Firefighters' objections, the district court upheld the consent decrees. Thus, the appellants were not deprived of an opportunity to be heard as required by the due process clause. The Firefighters' suggestions that an evidentiary hearing was required to rule on its intervention petition is spurious in view of the consideration of their objections.

In *Culbreath v. Dukakis*, *supra*, the court similarly denied a motion to intervene on the ground that the intervenor's rights had been adequately represented in that the trial court had considered the potential objections, determined the settlement was fair, adequate and reasonable and not unlawful and that the plaintiffs enjoyed a substantial probability of success on the merits. Thus, the appeals court found that only a slight possibility of prejudice might flow to the union from a denial of intervention.

(4) The existence of unusual circumstances militating either for or against a determination that the application is timely.

With respect to the fourth factor regarding time limits, there are no unusual circumstances militating for intervention.

(5) Intervention was appropriately denied.

Analysis of the four factors which must be considered in passing on the timeliness of a motion to intervene indicates that the trial court did not abuse its discretion in denying intervention. The passage of many years from the time the union should have known of its interest in the case places a heavy burden on the union to make a strong showing justifying intervention. *Moten v. Bricklayer's International Union*, *supra* at p. 228; *Commonwealth of Pa. v. Rizzo*, *supra* at p. 501. The existing parties to the litigation have demonstrated they will suffer significant prejudice if intervention is allowed at this late date, while the Firefighters have made no showing of substantial prejudice which is likely to result from denial of intervention.

The trial court's decision to deny intervention has not been shown to have been an abuse of discretion.

II. THE FIREFIGHTERS DO NOT HAVE STANDING TO CONTEST CONSENT DECREE PROVISIONS WHICH DO NOT AFFECT THEIR MEMBERSHIP

The Firefighters lack standing to contest hiring goals and requirements. An association may obtain standing to seek judicial relief from injury to itself or as the representative of its members, even in the absence of injury to itself. *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Warth v. Seldin*, 422 U.S. 490 (1975); *Hunt v. Washington State Apple Adv. Comm.*, 432 U.S. 333 (1977). Obviously, the Firefighters lack standing with respect to the consent decrees [sic] effect on employees of other departments. *U.S. v. City of Miami*, 614 F.2d 1322 (5th Cir. 1980); *aff'd in part and vacated and remanded in part*, 664 F.2d 435, (5th Cir. 1981) (en banc). However, the Firefighters have also failed to assert any facts or averments demonstrating that it has standing in either capacity with respect to the provisions of the consent decree governing the hiring of both blacks and women for the fire department.

In *Warth v. Seldin* the Supreme Court established that in order to obtain standing as a representative of its members, an association must satisfy the following criteria:

> The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit . . . So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members . . .

422 U.S. at p. 511.

Based on these criteria the Firefighters' union has failed to demonstrate that it has standing to assert the rights of its members. Although the Firefighters object to entry level requirements and hiring goals, obviously the Firefighters lack standing with respect to entry level jobs in that the union's members are already employees of the city. Furthermore, with respect to the promotional goals the Firefighters fail to show a sufficient direct and personal injury to its members. To the extent blacks belong to the Firefighters union, there are likely antagonistic interests in any event.

Likewise, with respect to the union's standing on its own behalf, it has alleged no facts indicating how the union has suffered, or will suffer, any injury in fact. The Supreme Court in *Sierra Club* stated that "'A mere interest in a problem', no matter how long standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected'". *Sierra Club*, 405 U.S. 739. The Firefighters simply have failed to meet that standard by demonstrating a sufficiently direct injury to confer standing. As noted *infra*, the Firefighters' Association has no contractual rights to protect; thus, the Firefighters [sic] situation is distinguishable from that of the unions in *City of Miami*, *supra*; and *EEOC v. AT&T*, *supra*, who were held to have standing because of the effect of affirmative action provisions in the consent decrees on contractual seniority provisions. Furthermore, as one trial court observed:

> Where, as here, however, both those promoted and those "passed over" are members of the Union, it is difficult to say with certainty that the Union has the personal stake and interest sufficient to assure that concrete adverseness required by Article VII of the Constitution.

Germann v. Kipp, 14 F.E.P. Cases 1197, 1200 (W.D. Mo. 1977).

The appellant organization, therefore, fails to meet the requirement that a party seeking review must allege facts showing that he has been adversely affected.

III. IN ALABAMA PUBLIC EMPLOYEES DO NOT HAVE COLLECTIVE BARGAINING RIGHTS AND, ACCORDINGLY, THE FIREFIGHTERS HAVE NO RIGHTS AFFECTED BY THE CONSENT DECREES

Under Alabama law a public employer cannot enter into a valid labor contract with a labor organization concerning

wages, hours, and conditions of employment in the absence of express constitutional or statutory authority to do so. *Nichols v. Bolding*, 291 Ala. 50, 277 So. 2d 868, (1973); *Int'l Union of Operating Engineers v. Water Works Board*, 276 Ala. 462, 163 So. 2d 619 (1964). There is no Alabama statute authorizing public employers to contract with a labor organization. In 1977 the Legislature of Alabama enacted *Code of Alabama, 1975*, § 11-43-143 which provides:

> (a) No person shall accept or hold any commission or employment as a fire fighter or fireman in the service of the state or of any municipality in the state who participates in any strike or asserts the right to strike against the state or any municipality of the state, or be a member of an organization of employees that asserts the right to strike against the state or any municipality in the state knowing that such organization asserts such right.
>
> (b) All fire fighters serving the state or any municipality in the state either as paid firemen or as volunter [sic] fire fighters who comply with the provisions of this section are assured the right and freedom of association, self-organization and the right to join or to continue as members of any employee or labor organization which complies with this section, and shall have the right to present proposals relative to salaries and other conditions of employment by representatives of their own choosing. No such person shall be discharged or discriminated against because of his exercise of such right, nor shall any person or group of persons, directly or indirectly, by intimidation or coercion compel or attempt to compel any fire fighter or fireman to join or refrain from joining a labor organization. (Acts 1967, No. 229, p. 598.)

Thus, although the law of Alabama does not limit the right of firefighters to organize labor unions and present proposals relative to salaries and other conditions of employment, the Supreme Court of Alabama in *Nichols v. Bolding*, *supra* at p. 56, held that there is nothing in the statute which would indicate that the Legislature intended to require public officials to negotiate with the Firefighters' union or that the Legislature intended to grant public employees collective bargaining rights.

Indeed, appellants concede that, "In Alabama, public employees do not have collective bargaining rights." [Appellants' Br. at p. 37] Thus, the Firefighters acknowledge that by virtue of law, public employees in Alabama cannot enter into a labor contract.

Furthermore, the numerous cases relied on by the appellants with respect to limitations on quotas and goals are inapplicable. As none of the subjects of the proposed consent decree was a matter of contract with the union, the union here does not occupy the same position as was the case in *U.S. v. City of Miami* which speaks only to the propriety of goals and quotas in the context of the non-concurrence of a union which was a *party* to the litigation *and* had a collective bargaining agreement. The absence of impaired contractual rights, therefore, provides an unambiguous distinction between this case and *City of Miami* 664 F.2d at 447 (. . . "we are not prepared to hold that the consent decree is valid insofar as it deprives the FOP and its members of the benefit of the promotion procedure that was in effect a part of the FOP contract with the City.").[4] Rather, *U.S. v. City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980) controls the present litigation. The Fifth Circuit's *Miami* analysis on rehearing focused on the fact that the consent decree involved affected the F.O.P.'s contract with the city and that under Florida law, when a subject is encompassed within the terms of existing contract, a public employer may not foreclose bargaining on the subject or unilaterally alter the terms and conditions of employment. Thus, *City of Miami* is inapposite to this appeal and does not govern the judicial approval of proposed settlements in contexts other than that of a proposed

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4 In his opinion below, Judge Pointer correctly noted in response to the Firefighters' contention that after *City of Miami* no changes in the Civil Service rules should be approved without its consent as a union: "The point however is that--unlike the situation in the *City of Miami* case — none of the rules to be altered under the proposed consent is a matter of contract with the union. Rather, the case of *sub juidice* [sic] is like that involved in the *City of Alexandria*, a decision left intact when rehearing was granted in the *City of Miami* decision one may reasonably assume that en banc rehearing was granted to reconsider the consequences upon a proposed settlement of non-concurrence of a union which was party to collective bargain [sic] rules and not for the purpose of reconsidering the basic rules governing judicial approval of proposed settlements." (R.I, 319)

consent decree which affects matters of contract with a union with a collective bargaining agreement.

No collective bargaining rights of the Firefighters are affected by the challenged decrees under Alabama law. Therefore, proposed intervenors do not possess contractual rights as were abridged in *City of Miami* thus requiring union participation in that case. Therefore, the applicable standard governing judicial approval of proposed settlements is that established in *City of Alexandria*.[5]

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5 Furthermore, it should be noted that under ***Bonner v. Pritchard***, 661 F.2d 1206 (11th Cir. 1981) the en banc decision in *City of Miami* is not binding as precedent on the Eleventh Circuit, in that the Eleventh Circuit stated in ***Bonner*** that decisions of the Fifth Circuit as that court existed on September 30, 1981, handed down by that court prior to close of business on that date, would be binding as precedent on the Eleventh Circuit, but the court reserved for future consideration the effect on Eleventh Circuit law of decisions handed down by the former Fifth after September 30, 1981 in cases submitted to that court for decesion [sic] before October 1 and possible future en banc decisions by the old Fifth changing what appeared to have been its rule as of September 30, 1981. As the *City of Miami* en banc decision was not handed down until December 3, 1981, it falls into this latter category of cases.